Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1500

DON R. ERICKSON, Warden
South Dakota State Penitentiary, Petitioner,

v.

United States of America ex rel.
JOHN LEE FEATHER, Respondent,
United States of America ex rel.
LAVERNE BLACK THUNDER, Respondent,
United States of America ex rel.
AMBROSE ST. JOHN, Respondent,
United States of America ex rel.
JAMES R. KEEBLE, Respondent,
United States of America ex rel.
CURTIS SMALL, Respondent,
United States of America ex rel.
ROMAN V. DERBY, Respondent,
United States of America ex rel.
JOSEPH DAY, Respondent,
United States of America ex rel.
ARNOLD LAFROMBOISE, Respondent,
United States of America ex rel.
CLARENCE WALKER, Respondent,
United States of America ex rel.
THEODORE DUANE WYNDE, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The decisions and orders of the United States District Court of South Dakota, Northern Division, as yet unreported appear at Appendix B of the Petition for Writ of Certiorari. The opinion of the Eighth Circuit Court of Appeals is reported at 489 F.2d 99 and is reproduced at Appendix A to the Petition for a Writ of Certiorari.

JURISDICTION

The judgment and opinion of the Court of Appeals was filed December 7, 1973. A timely petition for rehearing, and rehearing en banc was denied on January 8, 1974. The petition for a writ of certiorari was filed April 8, 1974, and was granted June 3, 1974. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

Articles 3 and 10 of the Treaty of February 19, 1867, 15 Stat. 505, sections 26-30 of the Act of March 3, 1891, 26 Stat. 989, 1035, and 18 U.S.C. are set forth at Appendix C to the Petition for a Writ of Certiorari.

QUESTION PRESENTED

Whether the Act of March 3, 1891, amending and ratifying an 1889 agreement for the outright cession and sale of all the unallotted lands of the Lake Traverse Reservation to the United States Government for a sum certain, disestablished said reservation and restored said lands to the public domain.

STATEMENT OF THE CASE

These consolidated cases are the result of habeus corpus petitions initiated in the United States District Court of South Dakota, Northern Division, in which the petitioners below claimed that the State of South Dakota did not have jurisdiction to try, convict and sentence them to the South Dakota State Penitentiary because their criminal acts took place within the boundaries of the Lake Traverse Reservation. Accordingly, they requested that their sentences be vacated and they be released. The district court denied the writs of habeus corpus and the petitioners below appealed.

On December 7, 1973, the Eighth Circuit Court of Appeals reversed and remanded for proceedings consistent with its opinion.

SUMMARY OF ARGUMENT

The Lake Traverse Reservation was disestablished by

Congress in 1891 by the ratification of an 1889 agreement whereby the members of the Sisseton-Wahpeton Tribe agreed to "cede, sell, relinquish, and convey to the United States all their claim, right, title and interest in and to" all the unallotted land of their reservation for a sum certain. This act, on its face and especially in light of the legislative history and surrounding circumstances, clearly restored the lands so ceded to the public domain. Members of Congress and the Commissioner of Indian Affairs at the time repeatedly and specifically attributed this affect to the ratification of the agreement.

Although the 1889 cession agreement was tailored to the Dawes Act of 1887, an examination of the documents of the period in their proper historical perspective conclusively establishes that Congress did not intend to alter the established "public domain" precept of the cession era.

ARGUMENT

I

ON ITS FACE AND IN LIGHT OF THE LEGISLATIVE HISTORY AND SURROUNDING CIRCUMSTANCES, THE ACT OF MARCH 3, 1891, CONCLUSIVELY ESTABLISHES THAT CONGRESS INTENDED TO DISESTABLISH THE LAKE TRAVERSE RESERVATION BY RESTORING ALL THE UNALLOTTED LAND THEREIN TO THE PUBLIC DOMAIN.

> If the policy of allotting lands is conceded to be wise, then it should be applied at an early date to all alike wherever the circumstances will warrant. If we have settled upon the breaking up of the tribal relations, the extinguishment of the Indian titles to surplus lands, and the restoration of the unneeded surplus to the public domain, let it be done thoroughly. If reservations have proven to be inadequate for the purposes for which they were

> designed, have shown themselves a hindrance to the progress of the Indians as well as an obstruction in the pathway of civilization, let the reservations, as speedily as wisdom dictates, be utterly destroyed and entirely swept away. Report of the Commissioner of Indian Affairs, 8 (1891).

A. CONGRESS DID NOT ALTER THE FUNDAMENTAL PRECEPT OF CESSION AGREEMENTS BY SIMPLY TAILORING THE AGREEMENTS TO THE DAWES ACT OF 1887.

In 1867 the members of the Sisseton and Wahpeton bands of Sioux Indians were given a large triangular area of land known as the Lake Traverse Reservation, situated in what is now the northeastern part of South Dakota. In early 1889 certain members of the tribe were approached and indicated they would sell their reservation:"..[w]e never thought to keep this reservation for our lifetime. . . .We don't expect to keep reservation. We want to get the benefit of the sale. . . ." *The Minneapolis Tribune*, May 22, 1889 at 1 (Appendix I, 19).

Soon thereafter, a Commission, sent to negotiate the purchase concluded an agreement whereby the members of the Sisseton–Wahpeton bands of Sioux Indians agreed to:

> . . .cede, sell, relinquish, and convey to the United States all their claim, right, title and interest in and to all the unallotted lands within the limits of the reservation set apart to said band of Indians as aforesaid. . . .Act of March 3, 1891, 26 Stat. 1032.

In his Annual Report to the Secretary of Interior for 1890, the Commissioner of Indian Affairs stated that the agreement would "restore to the public domain. . .about six hundred and sixty thousand acres in South Dakota, in the Lake Traverse

(Sisseton) Reservation" upon ratification. Report of the Commissioner of Indian Affairs, XXXVIII (1890). The Secretary of Interior's Annual Report was identical in this respect. H.R. Exec. Doc., 51st Cong., 2d Sess. (1890).

On the floor of the Senate, a moment before ratification, Senator Dawes stated clearly and concisely:

> The remainder of the bill is made up of the other appropriations necessary to carry out the agreements that were made with Indians for the surrender of a large portion of their reservations to the public domain. In the main it has cost the United States between $1.25 and $1.50 per acre for some ten or eleven million acres of land. All this land is opened by this bill to settlement as a part of the public domain. . . .22 Cong. Rec. 3879 (1891).

The agreement was ratified on March 3, 1891, and the sum of one million, six hundred ninety nine thousand, eight hundred dollars was placed by the United States Government in the treasury of the United States to the credit of said Sisseton-Wahpeton Band of Sioux Indians "to pay" for the "lands by said agreement ceded, sold, relinquished and conveyed. . . ." Act of March 3, 1891, 26 Stat. 1039.

In his Annual Report to the Secretary of Interior for 1891, the Commissioner of Indian Affairs stated ". . .The ratification of agreements by the act of March 3, 1891 (26 Stats., 989), restored to the public domain. . .from the Lake Traverse Reservation, South Dakota, about 660,000 acres,. . ." Report of the Commissioner of Indian Affairs, 44 (1891). The Secretary of Interior's Annual Report was identical in this respect. H.R. Exec. Doc. No. 66, 52 Cong., 1st Sess. (1891).

The reservation was "thrown open" in 1892 and the large orange triangle representing the Lake Traverse Reservation was

immediately and unequivocally removed from the official map of the Office of Indian Affairs compiled under the direction of the Commissioner of Indian Affairs, showing Indian reservations within the limits of the United States. Report of the Commissioner of Indian Affairs, Appendix (1892). The figures in the "area in acres" and "square miles" sections of the "Schedule showing the names of Indian reservations in the United States Agencies, tribes occupying or belonging to the reservation, etc." were also similarly deleted. Report of the Commissioner of Indian Affairs, 908 (1892).

From this date on, the "former Lake Traverse" terminology begins to appear in the official communications of the Office of Indian Affairs and the Department of the Interior, a designation found in hundreds of other miscellaneous sources as well. In any one year, this or some designation of similar import appears in communications of those concerned with what "was" the Lake Traverse Reservation, a sampling of which reads:

1. "[F]ormer Sisseton and Wahpeton Reservation"–Assistant Commissioner of the General Land Office (1897). Letter, Appendix I.1.

2. "[U]pon the former Sisseton–Wahpeton Reservation"–Member of the Sisseton–Wahpeton Bands of Sioux Indians (1901). Letter, Appendix I, 2.

3. "[W]ithin the former Lake Traverse Indian reservation"–Affidavit of United States Special Agent (1902). Letter, Appendix I,3.

4. "[C]ertain described land in the former Sisseton Reservation" – Commissioner of Indian Affairs (1902). Letter, Appendix I, 6.

5. "[I]n what was formerly the Sisseton Indian Reservation"–Chairman of House Committee on Indian Affairs (1906). Letter, Appendix I, 9.

6. "[I]n former Sisseton and Wahpeton Reservation"–Commissioner of Indian Affairs (1912). Letter, Appendix I, 10.

7. "[I]n former Sisseton and Wahpeton Reservation"–Acting Chief of Land Division, General Land Office (1913). Letter, Appendix I, 11.

8. "[W]within the former Lake Traverse Reservation" – Assistant Commissioner of Indian Affairs (1918). Letter, Appendix I, 12.

9. "[I]n the former Sisseton Indian Reservation"–Commissioner of Indian Affairs (1918). Letter, Appendix I, 14.

Your Petitioner cannot and will not argue that this disestablishment and restoration to the public domain of the Lake Traverse Reservation was intended by Congress to be an exception to the prevailing legislation of the period because the documents of the period simply do not support that conclusion. Indeed, if one were to page through almost any Annual Report of the Commissioner of Indian Affairs from 1887 until 1915 a contrary preconception would instantly vanish. The gist of the quotation of the Commissioner of Indian Affairs in 1891 set forth, *supra,* could be similarly documented in 1890 under the heading of "REDUCTION OF RESERVATIONS" or in 1892 under the heading of "COMMISSIONS AND NEGOTIATIONS FOR REDUCTION OF RESERVATIONS." Report of the Commissioner of Indian Affairs, XXXVII (1891), Report of the Commissioner of Indian Affairs, 74 (1892), respectively. An examination of the Maps of Indian Reservations published each

year therewith graphically illustrates this precise point.[1]

Therefore, as a preface to the detailed examination of the legislative history of the Act of March 3, 1891, the argument of Petitioner will be in the form of a brief reconstruction of the position Petitioner thinks that Congress assumed in relation to Indian land cessions during the period from 1860 until 1900. To what extent the conclusions drawn from this reconstruction are in conflict with the holding of *Seymour v. Superintendent*, 368 U.S. 351 (1962), and *Mattz v. Arnett*, 412 U.S. 481 (1973), and the line of recent cases adhering to the rationale therein, is, of course, for this Court to resolve in whatever manner it deems appropriate.

Before 1887 it was the fundamental precept and purpose of the Indian land cession policy that the ratification of a cession agreement would extinguish the Indians' claim or title to a given described area. If the ceded area, or area to be so extinguished, included only a portion of the reservation, the boundaries would necessarily be diminished so as to encompass the reduced area or reservation remaining, and the members of the tribe would be required to remove thereto. If the whole reservation was to be ceded or extinguished, the boundaries were nevertheless just as necessarily extinguished, with the tribes involved usually being required to remove to another reservation. In both instances the area so ceded would be restored to the public domain and later "opened" to homesteading.

Petitioner has been unable to substantiate that Congress intended to alter this fundamental aspect of Indian land

1. A complete set of these maps will be presented to this Court in seperate appendix.

cessions by enacting the Dawes Act of 1887. Indeed, an examination of the documents of the period presented herein would seem to compel the opposite conclusion.

Admittedly, the 1887 Act effected several changes with respect to the established cession policy. However, none of these were in any way intended to affect, nor did they affect the necessary diminution the cession or sale would have had on the boundaries of that particular reservation. In fact, by utilizing Section 5 of the Dawes Act and tailoring cession agreements to conform thereto, Congress could and did effectively reduce the size of Indian reservations at a much more rapid pace than had theretofore been possible. As succinctly stated by the Commissioner of Indian Affairs:

> If the policy of allotting lands is conceded to be wise, then it should be applied at an early day to all alike wherever the circumstances will warrant. If we have settled upon the breaking up of the tribal relations, the extinguishment of the Indian titles to surplus lands, and the restoration of the unneeded surplus to the public domain, let it be done thoroughly. If reservations have proven to be inadequate for the purposes for which they were designed, have shown themselves a hindrance to the progress of the Indian as well as an obstruction in the pathway of civilization, let the reservations, as speedily as wisdom dictates, be utterly destroyed and entirely swept away. Report of the Commissioner of Indian Affairs, 8 (1891).

For purposes of illustration, assume that a certain cession or sale for the entire north half of a reservation was proposed in 1889, but only a small percentage of the members of the tribe had as of that date received an allotment. If this proposal nevertheless met with the approval of the Commissioner of Indian Affairs, he would write the Secretary of the Interior and

therein cite §5 of the Dawes Act which provides:

> *And provided further*, That at any time after lands have been allotted to all the Indians or any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress. . .Act of February 8, 1887, 24 Stat. 389-390.

Paraphrased for the purpose of our hypothetical example, this section would allow the Secretary to negotiate for the release of "such portions" of the reservation not allotted if the tribe would consent, irrespective of the fact that only a small percentage of allotments had yet been made and these were scattered throughout the entire reservation.

If the Secretary concurred, he would appoint several commissioners and ask that the Commissioner of Indian Affairs submit a "draught of instructions" for his approval. After approval, the instructions would be forwarded to the Commissioner. In most instances the information contained therein was of a very general nature, such as the year the reservation was created and the number of signatures required for the necessary "consent."

The Commission would proceed to the reservation, negotiate the cession and draw up an agreement for the

approval of the tribe containing the price per acre and certain other specifics, such as the total amount of money the United States was to pay for the area ceded, which would be held in trust for the benefit of the tribe, again pursuant to §5 of the Dawes Act. The entire agreement would not be effective until ratified by Congress, again pursuant to §5 of the Dawes Act. Then the agreement would be amended in Congress to provide that the land so sold or released by the tribe to the United States was required to be held by the United States for the sole purpose of securing homes to actual settlers if it was adaptable to agricultural purposes, again pursuant to §5 of the Dawes Act.

In our hypothetical the agreement would of necessity have to describe and separate the north half or area ceded by some boundary marker or other survey from that portion of the reservation unaffected by the cession, the south half. In all agreements of this type this was in fact the case. One part of the reservation had been ceded and would thereby soon be restored to the public domain and be opened to homesteading upon amendment and ratification by Congress and proclamation by the President. The other part would remain intact and be referred to as the diminished reservation, or the remaining reserve, or just the reservation.

As for those individuals whose allotments were now soon to be situated in a newly created public domain, they were usually given the election to remain so situated or to relinquish their allotment and remove to the diminished reservation and/or the reservation and reselect therein. At a later date this whole process was sometimes repeated again on the same reservation and thus the original reservation would be eventually reduced to one-fourth of its original size with the ceded area restored to the public domain and opened to actual homesteaders.

Of course in our hypothetical there would be no question as to the effect of the agreements, as ratified, on the boundaries of the original reservation. With each opening there would, of necessity, be a proper delineation of the area opened from the area remaining or the diminished reservation. In some cases the "public domain" terminology would appear in the text of the Act and in others it would not. In some cases the "diminished reservation" terminology would be repeatedly referred to in the text of the Act and in others it would not. [2]

In any event, boundary questions over agreements of this type from this era have not been difficult for the courts to dispose of precisely because of the fact that only a portion of the reservations were open and there necessarily exists enough documentation related to the remaining or diminished reservation to resolve the issue.

However, the precise effect Congress intended acts similar in all respects to the above example to have, when the agreement provided for a cession of all of the unallotted land of the reservation, is a much more difficult determination and is *precisely* the situation presented in the instant case.

The difficulty arises in part because of the fact that if Petitioner's reconstruction is correct, [3] there would be no new or diminished reservation and therefore no new or diminished reservation boundaries for the agreement for Congress to be concerned with. Nevertheless, after the opening, the allotments would still be situated on the public domain surrounded by settlers in precisely the same fashion as those areas affected by

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2. See discussion, *infra*, at 54-57.

3. This reconstruction is documented, *infra*, at 52-74.

the partial openings discussed *supra*, and the reservation would have been just as effectively disestablished. [4] In addition thereto, in the instant case, the difficulty is compounded by the mountain of Indian-related legislation that was pending before Congress at the time the Sisseton-Wahpeton agreement was being considered. Consequently, there is very little legislative history even directly concerned with the Act which this Court must construe and half or what is available is concerned with a "loyal scout claim" the Sisseton-Wahpetons had insisted be included with a consideration of the cession agreement.

Thus the importance of construing the Act in a proper historical perspective, *however improper that perspective might now appear*, becomes even more a necessity in order to avoid what Petitioner believes, in light of *Mattz*, *supra*, and *Seymour*, *supra*, might lead to a misconstruction of the crux of three decades of legislation. To this end, and for this purpose, your Petitioner will present (1) the detailed series of quotations from the surrounding circumstances and legislative history of the Sisseton–Wahpeton Act, (2) a comparison of the Sisseton–Wahpeton Agreement, in essence a cession agreement tailored to the Dawes Act, with another pure cession agreement, ratified and passed by the same Congress, the same day, in the same Act as the Sisseton-Wahpeton Agreement. All of which Petitioner thinks will clearly establish that Congress did not intend any modification necessary under the Dawes Act to alter the fundamental precepts of the cession era– precepts which necessarily diminished or extinguished all reservations.

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4. Congress was also using this same basic cession format to extinguish reservations via cession agreements concluded with different tribes, each claiming some kind of title in the same areas whether it was within or without the boundaries of the existing reservation they were residing upon.

B. THE LEGISLATIVE HISTORY AND SURROUNDING CIRCUMSTANCES OF THE RATIFICATION OF THE 1889 SUM CERTAIN CESSION AGREEMENT WITH THE SISSETON-WAHPETON TRIBE CONCLUSIVELY ESTABLISH THAT CONGRESS INTENDED TO DISESTABLISH THE LAKE TRAVERSE RESERVATION BY RESTORING ALL OF THE UNALLOTTED LAND THEREIN TO THE PUBLIC DOMAIN.

The history of the Sisseton–Wahpeton negotiations follows the same general pattern found in the histories of similar agreements. After a period of time the areas bordering reservations would become populous and in need of additional land. Shortly thereafter, citizens of these communities would begin to lobby for the opening of a portion of the nearby reservation by sending communications to the Commissioner of Indian Affairs and their congressional delegation to the effect that the reservation was a barrier to the general welfare of the country, and blocked the extension and construction of much needed railroads.[5] They would argue that the Indians did not need the reservation, that they were already being allotted and that a large area should therefore be restored to the public domain and opened to homesteading. In general, the citizens were eventually successful.

In the case of the Lake Traverse Reservation, a banker from Milbank, South Dakota, set the process in motion by written communication of April 22, 1889, to the Secretary of Interior stating that the Lake Traverse Reservation was a "great detriment" to the area's "interests" and that it blocked the "progress of two or three lines of railroad" that they needed badly. Letter, Appendix I, 15. Additionally, Mr. Diggs informed

5. The construction of a railroad through a reservation involved a great deal of bureaucratic inertia.

the Secretary that the "opening of the reservation would give new impetus to immigration which has been attracted by government lands further west." Letter, Appendix I, 15.[6]

On May 1, 1889, Mr. Diggs assembled a convention of eight counties in Watertown, South Dakota, to "take Action Relative to the Opening of the Sisseton Indian Reservation." Resolution, Appendix I, 16. A resolution was prepared to the effect that the delegation would support the Indian "loyal scout claim" since this was necessary to obtain the consent of the Indians to opening the reservations to settlement–a reservation that was stated to be "lying in the midst of a well settled section of country. . .a barrier to the completion of railroads in course of construction or progress, and to the general welfare of the country," and "not now necessary to the interests of the Indians" since they had taken their allotments of lands. Resolution, Appendix I, 16.

The entire resolution was forwarded to the Acting Commissioner of Indian Affairs on May 4, 1889. Mr. Diggs then arranged a council with the leaders of the Sisseton–Wahpeton band, Chief Gabriel Renville and nine of his headmen. Again, members of the tribe expressed the view that if Mr. Diggs and his friends would help them clear up the "loyal scout claim" they would consent to the cession. In their words:

> We never thought to keep this reservation for our lifetime. . .
>
> Now that South Dakota has come in as a state we have some one to go to, to right our wrongs. The

6. Mr. Diggs was referring to the recent "opening" of the Great Sioux Reservation in South Dakota, which disestablished and restored to the public domain approximately 11,000,000 acres of land previously within the boundaries of the Great Sioux Reservation.

> Indians have taken their land in severalty. They are waiting for patents. The Indians are anxious to get patents. We are willing the surplus land should be sold. We don't expect to keep reservation. We want to get the benefit of the sale. If the government will pay what they owe, we will be pleased with the opening. There will be left over allotments 880,000 acres. If the government pays what they owe, and pay what they agree per acre, we will be pleased with the opening. When the government asks me to do anything, I am always willing to do it. I hope you will try to get the government to do what is right.
>
> If the government will do this, it will benefit both the Indians and the whites [and illustrates by holding up a half a dozen keys in a perpendicular position, separately,], we all stand this way [and then, pressing them against each other,], we will be as one key. When the reservation is open we meet as one body. We be as one. . . .
>
> If we get the money we will open up. Your committee needn't be discouraged, we will open up. . .
>
> We are anxious to become citizens and vote. We have laid before you all we have to say from our hearts. . . .The Minneapolis Tribune, May 22, 1889 at 1 (Appendix I, 19).

After the council, Mr. Diggs continued to bombard the Commissioner of Indian Affairs with questions of what could be done to facilitate an early opening. Letter, Appendix I, 21. On June 21, 1889, the Commissioner responded by forwarding the above mentioned resolution to the Secretary of the Interior with a cover letter wherein the Commissioner quoted the applicable section of the Dawes Act that made it lawful for the Secretary to negotiate with an Indian tribe:

> [F]or the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribes shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of the Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress. . .

and noted that the 1867 Treaty creating the reservation contained "no provisions applicable to such negotiations." Letter, Appendix I, 23.

He further stated that he thought it would "be for the best interests of the Indian to throw open to settlement a large portion of their surplus lands," and cautioned the Secretary that:

> Such negotiations can proceed no further than securing the consent of the Indians to the sale of such portion of the reservation as may be agreed upon, and determining the considerations for which they are willing to make the cession, these negotiations to be submitted for the approval of Congress, which alone can prescribe the form and manner of executing the necessary release. Letter, Appendix I, 24.

On August 13, 1889, a set of instructions "for the guidance of a Commission. . .to negotiate with the Sisseton and Wahpeton Indians for the sale of their surplus lands" were forwarded by T.J. Morgan, Commissioner of Indian Affairs to the Secretary of the Interior for his approval. Letter, Appendix I, 25. The purpose, as per instructions, was for "negotiating with the Sisseton and Wahpeton Indians for the relinquishment of such portions of the Lake Traverse Reservation, not allotted, as said Indians may consent to release." Letter, Appendix I, 26.

Noting that the Treaty made "no provisions regarding the cession or relinquishment of the reservation or any portion thereof" the Commissioner stated:

> You will call a full council of the bands and submit the subject for their consideration. If a majority of such council determined to sell any portion of the reservation, you will then agree upon the quantity of land to be sold, and its location. . . .
>
> The terms and conditions agreed upon in Council, with the description of the lands to be relinquished, should be reduced to writing and incorporated in the accompanying form of agreement. . . .Letter, Appendix I, 27.[7]

By November 12, 1889, three gentlemen were finally chosen to represent the government in the upcoming negotiations: Charles A. Maxwell, Esq., Chief of the Land Division of the Department of the Interior, Hon. E. Whittlesey, Secretary of the Board of Indian Commissioners, and the aforementioned Hon. D.W. Diggs. Letter, Appendix I, 29.[8]

On November 29, 1889, the Commission arrived at the Sisseton agency on the Lake Traverse Reservation. A Council was convened and the sessions continued over the next two weeks.

Initially General Whittlesey explained the purpose of their visit:

> General Whittlesey: We greet you all as friends. We know that you are our friends and we are your friends. We do not forget the friendship shown by you in 1862. We know how you have worked since you have been on this reservation for yourselves and for your children. Now you have selected your lands and have patents from the Government You own those lands and they can not be taken from you. More than that, you now stand in a new position as citizens of the United States and of South Dakota. You are under the same laws that other people have to obey and are protected by the same laws that protect other people. Coming to this position you need something to make this new start in life. You have a *tract of land* which is unoccupied and of no use to you, and you have been reported in Washington as wishing to dispose of some of those lands; they are yours and no one wishes to take them from you. There is this difference between you and other land-owners, you can *sell* only to the Government of the United States. This being the situation the Secretary of the Interior has sent us here to consult with you about your land. In order that you may know that what I have said is true, I will read to you the instructions from the Secretary. S. Exec. Doc. No. 66, 51st Cong., 1st Sess. 16 (1890), containing Council Transcripts (hereinafter cited as C.T. at) (emphasis added).

However, as far as Gabriel Renville was concerned there were other issues that continued to be conditions precedent to any discussions of a sale of the reservation:

> Gabriel Renville: They feel that they are not ready to speak of the surplus lands at present. At a meeting at Big Cooley last summer we told our friends Mr. Diggs and General Pease that there were some things in the way of our *selling* the surplus lands. There were three things in the way.The first is that the Government owes us. We have tried to get it, but can not. The second is that an error was made in the survey of this reservation, and we claim a

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7. At this point the Commissioner did not contemplate a cession of all the surplus lands. Rather, the description referred to would have probably been either a metes and bounds, or a geographical description, separating the area ceded from the remaining or diminished reservation.

8. Other gentlemen were considered and rejected as evidenced by the series of correspondence from September through November of 1889. Therein the negotiations were variously referred to as encompassing "sale of their surplus land in their reservation. . .sale of a portion of the surplus land of their reservation. . .sale of their surplus lands. . .sale of their unallotted lands. . .negotiations as to their surplus lands. . .sale of the surplus lands in the Lake Traverse Reservation."

> piece which we ask be counted in with the surplus lands. We have received our patents since the meeting at Big Cooley, which was at that time the third thing. My friend Diggs went with me to Washington to consult the authorities in regard to these matters. I presented my claim to the Secretary. The Secretary told me that that office would do all in its power to have our claim allowed. The feeling among the people is not that they do not intend to *sell* at all, but what we want is that our claim be allowed first. After that, if a commission comes we will sell to them if we can agree on terms. . . .In 1872 a commission came here, to treat for the lands lying between here and Devil's Lake. The commission called it 8,000,000, but it contained when surveyed 17,000,000 acres. We do not claim anything on this, but think that the little mistake in survey ought to be corrected. We simply want the amount of land included in the surplus land when sold. C.T. at 17.

General Whittlesey responded with a compromise which was eventually agreed upon:

> General Whittlesey: If we should have the back claim and the opening of the reservation all in one agreement one would help the other. Now we should be glad to hear from you about one thing. If you should be willing to sell this land how much would you ask per acre? I mean if the claim and the *sale of land* was on one agreement. C.T. at 18. (emphasis added).

The only other exchanges of any significance that were concerned with the specifics of the question in issue were:

> Mr. Diggs: The adjacent counties want this reservation opened, and also we were interested in your welfare. It would not only help you but it would help them. Now you see we were interested in having the reservation opened while you were

interested in having your claim paid. Your interests and ours have come together.

The people who wanted the reservation opened appointed a committee, Mr. Crossfield, General Pease, and myself, to go to Washington to attend to both of these matters. Chief Renville, Mr. Crawford, and this committee went to Washington and talked the matter over. The officers understand that you want the reservation opened and have sent these gentlemen here. They know all about your affairs.

Our proposition is this: After setting aside lands for schools, churches, and any who may not have received allotments, to buy the balance. When we have agreed on a price per acre, we recommend that the back annuities be paid first, from 1862 to date; second, that the surplus lands be paid for at a price agreed upon; these are the two points. We have several members of Congress from the Dakotas. These men are all in sympathy with and will work together to get the bill through. I have in my pocket a letter from one of the Senators saying, "I hope you will make a good treaty with those Indians; I will help get it through." . . .The opening of this reservation can carry your claim through, because by passing your bill they please you and get your votes, and by opening the reservation please the whites.

Gabriel Renville: We are friends; first settle our claim and then we will listen and talk with you about our surplus land.

I have spoken for all of the people, and it is their wish that I should say these things. *In the past there has been lots of land sold, but we have not benefited by the sales.* In 1867 they promised us they would help us, but they have not helped us very much for many years. Let them first settle our claim and then we will talk about our surplus lands. We are now citizens and can talk with you as such, and do not care to talk about shoe pacs, etc., but cash. *We can buy for ourselves what we need if payment is made in cash, and then we do not care to have the agency*

here after the surplus lands have been sold. The people have asked me to say this as their wish.

General Whittlesey: We were sent here to ask you *what land you wish to sell* and to make such arrangements and conditions as we agree upon . . . .We have written out here all about the sale of the surplus lands and the payment of this money. It is a long paper and would take me a long time to read it. (Here a synopsis of the agreement or proposition was read.)

Michael Renville: We have only said that when the *sale of surplus lands* is considered we would ask that one hundred sixty acres be given to each member of the tribe. You spoke of money due us, some of us think it ought to come to all who belong here, while others think that none but scouts should receive it. We said in council that we would not sell surplus lands until back annuities were paid, but you say that if the lands are now sold the back annuities would be paid at the same time. This pleases us. We want a transcript of the agreement so that we can take it and consider it.

General Whittlesey: About the land matter. We have been told that some of you have been dissatisfied because some of you get only 40 and 80 acres of land so we have put in this agreement an equal division of land so that each will receive 160 acres. That will include the children born since the allotments of land. These were the two conditions made by you in regard to the sale of the surplus land. Third point. After you have received your back annuities, each receives 160 acres of land; *you will sell all that is left. . .Do you wish to sell your lands? How much land do you wish to sell* and how much will you ask per acre for the lands you wish to sell? *We have heard you wish to sell all after allotments have been made.*

Mr. Diggs: That this reservation was given you in

place of all back annuities according to the Third Article of the Treaty. After I have read that article I want to explain how we hope to overcome that. (Here third article of treaty approved February 19, 1867, was read). Now, I tell you what a lawyer would say; he would say that you were not entitled to back annuities because you received this land for it. You would say that it was yours already; then the lawyer would say that if one was void all was void and you have no land. How are we to overcome that? Our Congressmen are your lawyers and we shall put in their mouths this argument: "These people have been wrongfully kept out of this annuity and it is *but justice to them that you should admit it and that they be permitted to sell it* [i.e., the reservation] for their benefit as in part for injustice done them." Now, for the benefit you will receive in addition to annuities.

This reservation will be quickly settled by whites, bringing the arts of civilization, establishing schools in every township, so that you can send your children to school without sending them miles away, and I have no doubt you will have entire control of all money coming to you, there being no use for Government schools. Another advantage is, that the whites will exchange work with you. This will enable you to cultivate 50 acres where you now cultivate 10.

There are other advantages which I have not mentioned. One is you will have towns and railroads and good markets near you. All this will make your lands more valuable.

Chief Renville: *It took two summers on the Big Sioux Reservation [referring to the negioations that preceeded the 1889 Act that disestablished approximately one half of the Great Sioux Reservation] and at White Earth Agency. We do not care to do this in a hurry. We first decided not to sell* until after scout bill was paid, but we reconsidered yesterday and have made up our minds to do something, but you would not hear us – –

. . .We know these extracts of laws. We know that a change was made in the *taking of land out West*, and also on the 3 per cent interest. If they can change the law in regard to the taking of land they can do so in regard to the 3 per cent. *We have decided to sell all of the surplus after each has received 160 acres.* We know that the money due us on the treaty of 1851 is ours, and it has pleased us to have that in. In regard to the people out West selling for $1.25 per acre, we know that one acre of our land is worth ten of theirs [Great Sioux, *supra*]. In 1872 a commission came here and took all we had outside of this reservation for 5 cents per acre, and in *1851 the very best of our lands were sold* at less than 1 cent per acre. *This little reservation is ours, and all we have left. There is nothing in our treaty that says that we must sell. It was given us as a permanent home, but now we have decided to sell* for $5 an acre. . . .I do not blame you for not doing all we ask. You are only following instructions of superior officers. Mr. Diggs, are we citizens of the United States?

Mr. Diggs answered: The laws of South Dakota regards you as such, but you are regarded as Indians by the Government as long as you are dependent on it.

Mr. Maxwell said: The fact of an Indian becoming a citizen of the United States does not make him other than an Indian. It does not change his blood or race. Citizenship is a political privilege, while the race of the man shows what he is. Michael Renville asks if they can vote?

Answer (by Commission) Yes.

Mr. Diggs said: You cease to be Indians when the reservation is open and you are drawing interest on money as citizens.

General Whittlesey: I will not weary you with a long talk this morning. When we closed yesterday there was one thing that seemed to be in the way; that was the interest on the amount to be paid for the land and how it should be paid.

Gabriel Renville: There has never been money paid to Indians in a lump in payment for lands. The Government always owes for the land and pays the interest on the amount the same as when one of you borrow money from another.

General Whittlesey: I do not want any mistake to go out. I want you to understand this agreement. It says that the interest is 3 per cent. In this letter we say that it ought to be 5 per cent, and we ask the honorable Secretary to ask Congress to say it will be 5 per cent. We have also promised to do all we can to make it 5 per cent, and I think you will have the help of the Representatives from Dakota. Now I believe that all understand this. We have talked a long time. If we should stay to hear more my hair could not get much whiter, but I would become to old to act. This is just as we explained it yesterday. We give you an opportunity to sign, but if all of you decide not to sign you have that right, but if you sign you put a great deal of work on us.

Gabriel Renville: Why is it that it takes three-fourths at other agencies to rule while with us you say it takes only a majority. Our treaty does not provide for the *sale of this land* at any time.

General Whittlesey: My friend Gabriel knows that among white people a majority rules.

Simonds: This paper is presented for signatures and I have said that I will sign. I am playing no game. I am doing what is right. I have already said that I will sign and will do so now. C.T. at 19-20, 21,22,24,25, 26,27,28-29 (emphasis added).

It took an additional three days for the Commission to obtain the required majority of adult male signatures and on December 27, 1889, the signed agreement and their report thereon was forwarded to the Commissioner of Indian Affairs.

This report is essentially a condensation of events which occurred during the Council containing the same "selling of their reservation" terminology and is reproduced at Appendix I,

On January 28, 1890, the Commissioner of Indian Affairs forwarded the above document and his report to the Secretary of the Interior stating in part that:

> It appears from the report and accompanying papers that an agreement was reached with said Indians, which is in substance as follows, to wit.
>
> By Article I, the Indians cede, sell, relinquish, and convey to the United States all the unallotted land within the reservation remaining after the allotments and additional allotments provided for in Article IV shall have been made.
>
> Article II provides that the United States will pay to the Indians $2.50 per acre for the land ceded.
>
> Article III provides for the payment of back annuities, and continues the annuities of $18,400 until July 1, 1901.
>
> Article IV provides for the equalization of allotments so that each person, including married women, shall have 160 acres. S. Exec. Doc. No. 66, 51st Cong., 1st Sess. 3 (1890).

In all, the Commissioner noted that there would be approximately 662,780 acres to which the Indian title is extinguished by the terms of the agreement" calling for an appropriation "for the ceded lands, . . .662,780 acres at $2.50 per acre, $1,656,950.00. S. Exec Doc. No. 66, 51st Cong., 1st Sess. 5 (1890).

On February 8, 1890, the Secretary of the Interior, John W. Noble, forwarded all of the above documents and his report to President Benjamin Harrison. Secretary Noble reiterated that:

> By the agreement the said Indians cede, sell, relinquish, and convey to the United States all their right, title, and interest in and to the unallotted lands within the Lake Traverse Reservation in North and South Dakota, remaining after certain additional allotments provided for shall have been made, at the uniform price of *two dollars and fifty cents per acre.*
>
> Allotments were made in 1887 upon this reservation to all who applied for and were found entitled thereto, in quantities as provided in the act of Congress approved February 8, 1887 (24 Stats., 388), under the fifth section of which the negotiations resulting in the agreement now presented were conducted.
>
> The Indians, however, were dissatisfied with said quantities (160 acres to each head of a family, 80 acres to each single person over eighteen years of age and to each orphan under that age, and 40 acres to each other single person under eighteen years of age), and insisted as a condition of the sale of their surplus lands that there should be allotted to each individual member of the band, without regard to age or condition, a sufficient quantity, in addition to the amount heretofore allotted, to make 160 acres. The fourth article of the Agreement accordingly provides for such additional allotments. S. Exec. Doc. No. 66, 51st Cong., 1st Sess. 2 (1890).

President Harrison's report and all of the above documents were then presented to Congress on February 18, 1890. In the President's message it was noted that:

> Perhaps the question of the payment by the United States of the annuities which were forfeited by the Act of February 16, 1863 (12 Stats., 652), should not have been considered in connection with this negotiation for the cession of these lands. But it appears that a refusal to consider this claim would have terminated the negotiation, and if the claim is just this allowance has already been too long

delayed. S. Exec. Doc. No. 66, 51st Cong., 1st Sess. 1 (1890).

The very next day the Vice President presented the President's message and accompanying papers to the Senate. 21 Cong. Rec. 1470 (1890). Senator Dawes then immediately moved that they be referred to the Committee on Indian Affairs and printed. 21 Cong. Rec. 1470 (1890). The same proedure was followed in the House on February 20, 1890, and, in addition, the entire text of the agreement was published in the *Congressional Record* at the request of Mr. Gifford from South Dakota. 21 Cong. Rec. 1549 (1890).

On February 21, 1890, Mr. Gifford introduced Bill H.R. 7309 to ratify and confirm the agreement which was referred to the Committee on Indian Affairs but never reported back. 21 Cong. Rec. 1638 (1890).

The agreement next surfaces in the Senate on March 21, 1890, with a Mr. Moody introducing Bill S. 3216 to ratify and confirm on behalf of Mr. Pettigrew from South Dakota who prepared the Bill but could not be present to introduce it . 21 Cong. Rec. 2455 (1890). It was then referred to the Committee on Indian Affairs and on April 11, 1890, Mr. Pettigrew submitted S. Rep. 661 to the House. 21 Cong. Rec. 3278 (1890). Only four paragraphs of the six page report were concerned with the cession agreement: [9]

> The Committee on Indian Affairs, to whom was referred Senate bill No. 3216, to ratify and confirm an agreement with the Sisseton and Wahpeton bands of Dakotas or Sioux Indians, and for other

9. The remainder of the report dealt with the "loyal scout claims." S. Exec. Doc. No. 66, 51 Cong., 1st Sess. (1890).

> purposes, have considered the same, and respectfully submit the following report:
>
> The negotiations of said agreement was made under authority conferred upon the Secretary of the Interior by the fifth section of the act of Congress approved February 8, 1887 (24 Stats., 388).
>
> By the terms of this agreement the said bands of Indians agreed to cede, sell, relinquish, and convey to the United States the unallotted lands within the Lake Traverse Reservation on the following conditions, to wit: That certain annuities claimed by them to have been unjustly withheld or forfeited under the act of February 16, 1863 (12 Stats., 652), be restored and paid; that an equalization of allotments be made, so as to give each Indian, without regard to age, sex, or condition, 160 acres; that the purchase price of the residue of their lands be fixed at two dollars and fifty cents per acre, and the proceeds thereof be held in trust by the Government for the sole use and benefit, the same, with the interest thereon, to be at all times subject to appropriation by Congress for their education and civilization. . . .
>
> As to the equalization of allotments on the basis of 160 acres, provided in the bill, *when viewed in the light of the fact that the additional allotments are in lieu of any residue which, under their title, these Indians could have reserved for the future benefit of their families,* and the further fact that they are soon to assume the responsibilities of citizenship, with all it implies respecting the moral and material welfare of their families, we think that the departure from the general allotment act of 1887 in the case of these Indians is just and proper and should be allowed. This policy is recommended by the Commissioner of Indian Affairs in his last annual report.
>
> This reservation contains 918,780 acres of agricultural lands, 127,887 of which have been allotted to the Sisseton and Wahpeton Indians under the act of Congress approved February 8, 1887 (24

Stats., 388). The additional allotments, as provided in article 4 of the agreement, will require 112,113 acres, making a total of 240,002 acres, which leaves a surplus, *including* the lands occupied by the agency and missionary societies, of 678,778 acres, *the Indian title to which will be extinguished by the terms of the agreement.* The cost of the purchase, at $2.50 per acre, will amount to $1,696,945, which is to be a trust fund held by the United States for the benefit of these Indians. The appropriation named in the bill is estimated to cover the purchase, and pay the back annuities.

Respecting the purchase price of the surplus lands, $2.50 per acre would, at first thought, appear too high; but considering the situation of this tract and the character of the land, in respect to its exeptional fertility and commercial value, the price is not unreasonable. This tract is well timbered and watered, which greatly enhances the value of prairie lands for general agricultural purposes, and besides it is surrounded by populous and prosperous agricultural communities in Minnesota and the two Dakotas, and is also easily accessible by railways. With sundry amendments relating only to the execution of the provisions of the bill, we recommend that the agreement be ratified and confirmed and that the bill as amended do pass. S. Rep. 661, 51st. Cong., 1st Sess. 1,3-4 (1890) (emphasis added).

It was not until May 17, 1890, that the Bill was presented for debate and then there was no debate at all—a four section standard amendment, one of which provided for homestead entry, was inserted and agreed to, and the Bill passed the Senate. 21 Cong. Rec. 4828 (1890).

In the meantime, Bill H.R. 9192 had been introduced in the House by Mr. Hall from the Committee on Indian Affairs on April 9, 1890. 21 Cong. Rec. 3224 (1890). The report thereon

contains language similar to S. Rep. No. 661:[10]

> The Committee on Indian Affairs to whom was referred an agreement with the Sisseton and Wahpeton bands of Sioux or Dakota Indians for the purchase and release of surplus lands in the Lake Traverse Reservation, also a bill submitted by the honorable Commissioner of Indian Affairs to ratify and confirm the same, and for other purposes (Senate Ex. Doc. No. 66, fifty-first Cong., 1st Sess.), have carefully considered the same and respectfully submit the following report:
>
> The said agreement was duly executed December 12, 1889, under the authority conferred upon the honorable Secretary of the Interior by the fifth section of the act of Congress approved February 8, 1887 (24 Stats., 388).
>
> By the terms of said agreement the said bands of Indians agreed to cede, sell, relinquish, and convey to the United States all unallotted land within the reservation on the following conditions, to wit: That a restitution be made of certain annuities claimed by them to have been wrongfully withheld; that additional allotments be made so as to secure to each member of the bands, without regard to age, sex, or condition, 160 acres; that the purchase price of the surplus lands shall be fixed at $2.50 per acre, and that the proceeds thereof be held in trust by the Government for their sole use and benefit, the same with accrued interest, to be at all times subject to appropriation by Congress for their education and civilization. . .
>
> The records of the Indian Office show that the Lake Traverse Reservation contains 918,780 acres of agricultural lands, and that 127,887 of which have been allotted under the act of February 8, 1887 (24 Stats., 388). It will require to make the additional allotments, as provided in article 4 of the agreement,

10. Approximately eight of the nine pages in this report were also concerned with the "loyal scout claims." S. Rep. 661, 51st Cong., 1st Sess. (1890).

112,113 acres, leaving a balance or surplus of 678,778 acres, *the Indian title to which will be extinquished by the terms of the agreement.* We are of the opinion that the equalization of allotments on the basis of 160 acres, as provided in the agreement, in view of the fact that these Indians have for many years adopted civilized habits and agricultural pursuits, and are soon to assume the responsibilities of citizenship, with all it implies respecting the maintenance of their family obligations to provide for the future material welfare of their children, and the further fact that the additional allotments are in lieu of any residue which, under their title, they might have retianed for the minor children of their respective families, is a just and reasonable provision. The policy of equalizing allotments in quantities of 160 acres is recommended by the honorable Commissioner of Indian Affairs in his annual report, and he heartily approves this article of the agreement. (See his letter of January 28, 1890, submitted as a part of our report).

The stipulation in Article II of the agreement, fixing the purchase price at $2.50 per acre, would appear perhaps at first thought, too high, but taking into consideration the character of the tract, being well supplied with water and timber, its exceptional fertility; the average value of the unimproved lands in the vicinity of this reservation, surrounded as it is with the populace and prosperous agricultural communities of the Dakotas and Minnesota, and its accessibility by railways, we think the price is just and equitable and within the purview of the act of February 8, 1887 (23, Stat., 388). . . .

We have further amended the bill providing for the purchase of the sixteenth and thirty-sixth second sections by the States wherein it is located, also limiting the settlement of the surplus lands to entries under the homestead laws, and requiring the entrymen to pay $2.50 per acre before patent shall issue, and prescribing the mode of payment. With the amendments indicated in this report, we

recommend that the agreement be ratified and confirmed and that the bill for carrying out its provisions do pass. H.R. Rep. 1356, 51st Cong., 1st Sess. 1,8,9 (1890)(emphasis added).

This bill was evidently tabled when the Senate passed the version referred to above two days later.

The version that passed the Senate, S. 3216 was referred to the House on May , 1890, and sent to the House Committee on Indian Affairs. 21 Cong. Rec. 4947 (1890). On June 3, 1890, Mr. Gifford, from the House Committee on Indian Affairs presented the Senate Bill, with an amendment:

Mr. GIFFORD, from the Committee on Indian Affairs, reported with amendment the bill of the Senate (S.3216) to ratify and confirm an agreement with the Sisseton and Wahpeton bands of Dakota and Sioux Indians, and for other purposes, accompanied by Report No. 2271. . .21 Cong. Rec. 5566(1890).

It was then placed on the House Calendar but for some reason did not come up for debate until September 29, 1890. On that date it was again Mr. Gifford who presented the Bill:

Mr. PERKINS. I yield to the gentleman from South Dakota [Mr. Gifford].
Mr. GIFFORD. Mr. Speaker, I desire to present the following Senate bill which I sent to the Clerk's desk. The Clerk read the title of the bill as follows:
A Bill (S. 3216) to ratify and confirm an agreement with the Sisseton and Wahpeton band of Dakota or Sioux Indians, and for other pruposes.
Mr. GIFFORD. Mr. Speaker, with the permission of the House, I will make a brief statement with regard to this Bill.
Mr. KILGORE. Let the bill be read.
Mr. GIFFORD. It is a long bill, and I will make a

brief statement as to its provisions if there is no objection.

The SPEAKER pro tempore. Without unanimous consent is given the bill will have to be read at length.

Mr. GIFFORD. I want to make a brief statement before the bill is read, if I may have unanimous consent to doso. This bill ratifies an agreement made with Indians in South Dakota, something like one thousand Indians, for the *cession or opening* to settlement of a portion of their reservation. The portion opened to settlement amounts to about 700,000 acres of land 678,000 acres. There are something like 900,000 acres in the total reservation. These Indians have all taken their allotments. They are civilized Indians, not blanket Indians. There remained unallotted for their use and benefit 112,000 acres in round numbers. By the terms of the agreement it is proposed to pay to these Indians the sum of $2.50 per acre. The agreement is perfectly satisfactory to the Indians and to all the parties concerned. The $2.50 per acre will be paid back by the settlers, or, in other words, the Government is reimbursed for the value of the land paid to these Indians for the land. It will be paid back into the Treasury of the United States by the settlers whenever the land is taken and occupied for settlement which will be at once.

In addition to that there is a provision in the bill paying to these Indians something like $450,000 in round numbers for back annuities. These Indians were a part of the Wahpeton band in Minnesota. In 1862 the Government stopped their annuities. About that time a certain number of this band enlisted in the Army of the United States. They served under Sully and Sibley in the Indian Wars of the Northwest and some of them, I think, went south. A provision in this bill proposes to reinstate the annuities of these loyal Indians, but only of the loyal Indians. That, in substance, is a statement of the provisions of the bill. I do not ask to have the bill read at length unless these gentlemen desire it,

or unless it will obviate the necessity of going into Committee of the Whole. I do not care to take up the time of the House.

Mr. HOOKER. Does this bill contain an appropriation of money?

Mr.. GIFFORD. Yes

Mr.. HOOKER. Then let it go to the Committee of the Whole.

Mr. GIFFORD. Do you insist upon the objection?

Mr. HOOKER. I think so, yes.

Mr. GIFFORD. I would very much desire to have the bill disposed of before Congress adjourns.

MR. HOOKER. There is no objection to that. This will not prevent its being considered at all.

MR. GIFFORD. We will have to withdraw the bill, then, if the gentleman insists.

Mr. PERKINS. I yield to the gentleman from Oregon (Mr.HERMANN) for the purpose of calling up a bill. . .21 Cong. Rec. 10699-10700 (1890)(emphasis added).

From this date forward, the Sisseton-Wahpeton Agreement would never again receive individual attention from the members of Congress. S. 3216 was not placed before either the House or the Senate again and it is .. not until February of the next year that the agreement emerges from the Washington maze.

Since the introduction of the Indian Appropriation Bill in the latter part of January, 1891, the House had been engaged in a general discussion of the various aspects of the Indian question. Nothing of earth-shaking consequence appears in over fifty pages of the *Congressional Record* that now record the general opinions of the Congressmen on everything from Indian education to Indian wars.

However, on February 16, 1891, Congressman Perkins, a representative from Kansas, proposed an amendment to the

Indian Appropriation Bill that would throw both houses of Congress into a general debate for over a month. This amendment incorporated the complete text of five cession agreements, one of which was the Sisseton–Wahpeton Agreement.[11] 22 Cong. Rec. 2762 (1891).

The fact that five agreements were considered *in toto* is as far as Petitioner is concerned, both advantageous and disadvantageous: Advantageous in that the information that can be gleaned from the extended remarks by the Congressmen on just about every type or variation of cession agreement that had ever existed provides some remarkable insight into what Congress meant by the cession and opening of a reservation or parts thereof in general; disadvantageous in that the Sisseton–Wahpeton Agreement received very little individual attention and therefore what could have been an excellent source from which to determine congressional intent does not even exist for all practical purposes.

For example, but for the reading of the text of the agreement and the amendments into the Record, all of the extended remarks on the Sisseton-Wahpeton Agreement specifically, could be condensed to less than four pages.[12] The first of these remarks was on February 17, 1891, when a Mr. Holman of Indiana was apprehensive about whether the lands would be opened under the Homestead Law and hence preclude speculation:

11. Four of the five, were pure cession agreements. The fifth, the Sisseton-Wahpeton agreement, was a cession agreement tailored to the Dawes Act of 1887. See 52-74 , *supra*.

12. Because this portion of theCongressional Record is the debate on what would eventually become the Act of March 3, 1891, petitioner has set forth, *infra*, the entire text of that portion of the debate which was concerned with the Sisseton-Wahpeton agreement.

Mr. HOLMAN. I wish to say to my friend from Arkansas [Mr.PEEL] that the main objection to this amendment and especially to the treaties with the Sioux of North and South Dakota, and with the Coeur d'Alene Indians, is this: That the lands are to be disposed of upon a principle entirely different from that contemplated by the homestead law. In view of the fact that the lands we are now acquiring from the Indians with the exception of the western portions of the Indian Territory, are the best lands remaining, and the only ones, practically, which are adapted to settlement without irrigation, it does seem to me that if there ever were any lands to which the homestead feature of the law ought to apply, it should apply to these lands.

I think, notwithstanding the fact the $1.25 an acre has to be paid for some of these lands, namely, those ceded by the Coeur d'Alene Indians, and that $2.50 an acre is to be paid for those ceded by the branch of the Sioux Indians in the Dakotas–notwithstanding these payments are to be made, that is no reason whatever why the homestead principle should be abandoned. *I insist upon that as the only way in which you can prevent speculation in your public lands*, and I trust my friend from Kansas [Mr. PERKINS] will not even desire that the disgraceful scenes witnessed in the settlement of Oklahoma shall again occur in this country; the spectacle of speculators seeking to seize land, and then pressing upon Congress legislation in violation of the principles of the homestead law, by which to acquire their title.

Mr. PERKINS. My friend will allow me to suggest that at the time he speaks of the only provision of law opening these lands to settlement was the homestead law.

Mr. HOLMAN. Well, not strictly; but the hope was mainfestly held out that that law would be modified.

Mr. PERKINS. Oh, no.

Mr. HOLMAN. I live in a section of the country from which there was a heavy emigration to Oklahoma. As a general rule persons went there for the purpose of speculation and not for the purpose of obtaining homes.

Mr. GIFFORD. If my friend from Indiana will permit

me, I will say that under the agreement ratifying the treaty made with the Sisseton and Wahpeton Indians the lands are only *open to homestead settlers*, and they are to be paid for rate of $2.50 an acre.

Mr. HOLMAN. But the provision is deceptive, as my friend will see.

Mr. PICKLER. Oh, no, it is not.

Mr. GIFFORD. The gentleman will see by referring to section 5—

Mr. PERKINS. If the gentleman wishes to offer an amendment covering the provisio / that he states I will not interpose any objection.

Mr. ROGERS. That is right.

Mr. HOLMAN. I want to say to my friend that the provisio he refers to reads as follows: *Provided*, that the settlers upon said lands shall be permitted to purchase the same at the rate of $2.50 per acre, one-fourth to be paid in cash and the balance in three equal annual installments until paid, and patents shall not issue until the settlers or entrymen shall have paid to the United States the sum of $2.50 per acre.

My friend will see that nothing is said about the homestead law.

Mr. GIFFORD. But in Section five of that bill that is provided for.

Mr. HOLMAN. Section Five does not apply here.

Mr. GIFFORD. I do not agree with the gentleman about that. But in any event we are perfectly willing to accept an amendment making the *lands open to homestead settlers only*, because that is what we want.

Mr. HOLMAN. I propose this amendment:

Provided, further, That all the lands *ceded* to the United States by said treaties which shall be subject to entry and settlement shall be disposed of under the provisions of the homestead law in all respects whatever, except as to the payment therefor, as provided by law, and except also as to Section 2301 of the Revised Statutes, which shall not apply to such lands. Those are the two exceptions I wish to make.

Mr. PICKLER. What is the Section of the Revised Statutes which you provide shall not apply?

Mr. HOLMAN. That is the commutation clause. I wish

to call my friend's attention to the fact that if the $2.50 sales are made, retaining that section, then at the end of six months, unless the bill is amended, a purchaser may pay the $2.50 an acre, which opens up this whole great body of land to speculation; a thing that ought not be thought of at this time.

Mr. GIFFORD. I, for one, am willing to accept the amendment, because I wish to see the same object accomplished which the gentleman intends.

Mr. PERKINS. I wish my friend from Indiana would send his amendment to the Clerk's desk so that it may be read. I did not quite comprehend it.

Mr. HOLMAN. This will require that the several provisions shall be stricken out which would be in conflict with this.

Mr. PERKINS. Certainly.

Mr. WILSON, of Washington. I want to ascertain the gentleman's views on this matter.

The CHAIRMAN. The amendment of the gentleman from Indiana will be read.

The Clerk read as follows: *Provided, further*,

That all the lands *ceded* to the United States by said treaties which shall be subject to entry settlement shall be disposed of under the provisions of the homestead law in all respects whatever, except as to the payment therefor, as provided by law, and except also as to section 2301 of the Revised Statutes, which shall not apply to such lands

Mr. HOLMAN. Now, Mr. Chairman, I wish to say but one word further. With the understanding that the proposition shall be accepted, and also that all the provisions in conflict with the provision shall be modified, I shall not so far as I am concerned, press the point of order.

Mr. PERKINS. I hope, Mr. Chairman, that that may be done.

Mr. WILSON, of Washington. Does the section of the Revised Statutes apply to the commutation?

Mr. HOLMAN. Yes, sir.

Mr. WILSON, of Washington. And you want to eliminate that?

Mr. HOLMAN. Yes, sir. I wish to call the attention of

the gentleman to the fact that, as to these two bands in South and North Dakota, *I think the vast body of land in the Dakotas occupied by the Sisseton and Wahpeton bands of Indians would go to the speculators if some such provision were not applied.*
Mr. PEEL. That amendment is acceptable.
The CHAIRMAN. Does the gentleman understand that the point of order is not pressed, and that this amendment is accepted?
Mr. HOLMAN. This amendment is to come in at line thirteen; and also the other proposition, that the other provisions of the bill be made to conform to it.
Mr. PERKINS. Certainly.
The CHAIRMAN. Is the point of order withdrawn?
Mr. HOOKER. I want to say a word upon that.
The CHAIRMAN. The gentleman from Mississippi.
. . .22 Cong. Rec. 2809-2810 (1891) (emphasis added).

The second reference to the Sisseton-Wahpeton Agreement was in the Senate on February 27, 1891. In response to a statement by Senator Dawes that the agreement incorporated in the amendment had separately passed the Senate previously and those now in the amendment were simply copies thereof, Mr. Pettigrew remarked:

Mr. PETTIGREW. I think the statement of the Senator from Massachusetts is entirely correct, except as to section 26, on page 203, with regard to the agreement with the Sisseton and Wahpeton Indians of South Dakota. In that instance the Senate passed a different provision with regard to the disposition of the lands of those Indians.
Mr. DAWES. Mr. President, I am bound to correct myself, not only as suggested by the Senator, but to this extent as to each of them. In them all we have changed in this appropriation the price per acre, and we have provided that it shall be $1.50 per acre as to all of them except the Sisseton, which is to be $2.50 an acre, because that is what we paid to those Indians; and we have provided that it shall be paid by the homesteader

in full within five years from the date of his first entry, and that one-half of it shall be paid in two years. Those changes as to the disposition of the lands enter into the seven agreements. I think I have stated it correctly now.
We have also modified the disposition of the land. Of course it is beyond our power to modify the agreements. The agreements are *in haec verba* as made by the commissioners, as read in the Senate, and as adopted by the Senate in separate bills.
Now, Mr. President, I would like to escape the reading of that which it is proposed to strike out, and which is sixty or seventy pages, and the placing in its place of some number of pages, as I have suggested.
Mr. CALL. Mr. President ——
The PRESIDING OFFICER. Does the Senator from South Dakota [Mr. PETTIGREW] yield to the Senator from Florida [Mr. CALL]?
Mr. PETTIGREW. No, sir. There is one additional feature, and that is this: The bill, as it passed the Senate, gives the Sisseton and Wahpeton Indians 5 per cent interest upon their permanent fund, and this is the amount of interest which the United States has paid to the Sioux Indians upon the Sioux reservation [Great Sioux, *supra*] and to the Indians in the Indian Territory. It seems to me that these Indians who have been friendly to the Government, not only in the past, but always, even during the Minnesota difficulty in 1862, ought not to be deprived of this 2 per cent interest. 22 Cong. Rec. 3453 (1891).

The third reference was also made by Mr. Pettigrew in the Senate and again was initially concerned with the "interest" question:

Mr. ALLISON. I should like to know why this change is to be made?
Mr. PETTIGREW. The amendment which I have offered is exactly the same as a bill which passed the Senate with regard to the disposition of these lands, except that it requires the homesteader to pay $1.50 per acre instead of $2.50 per acre and reserves for the benefit of

the public schools sections 16 and 36.

Mr. DAWES. So far as the last suggestion of the Senator is concerned, the Senator from Montana [Mr. SANDERS] has an amendment which applies to all of the agreements, prescribing that the sixteenth and thirty-sixth sections in all cases shall be reserved for schools.

The reason why it is proposed to have the settler pay $2.50 for this land is because the land was of such value that we were obliged to pay that sum for it to the Sissetons and Wahpetons under the agreement. *We have paid a very large sum for this land, larger in proportion per acre than under any of the other agreements.* Therefore it was deemed wise that we should recover it back from the settler. It was stated by the commissioners before the Committee on Indian Affairs that this land was so valuable that it would be taken at $3 or $4 or $5 an acre, and it was suggested that we fix the price at $2.50 an acre, which they thought ought to be the minimum price for it. We should thereby come somewhere near reimbursing ourselves for the large sum paid for this land to the Sissetons and Wahpetons.

Mr. EDMUNDS. How much do we pay the Indians?

Mr. DAWES. Two dollars and a half an acre. I hope, therefore, the amount fixed in the bill will not be reduced.

Mr. MORGAN. There is another reason connected with it, and that is that 160 acres is the largest amount that a man can buy of this land. It was supposed by the committee that, being confined to 160 acres at $2.50 an acre, the land being worth it, and worth a good deal more, *it would draw into that country a better class of population*, which was thought to be a good move.

Mr. EDMUNDS. Then we ought to disagree to the amendment of the Senator from South Dakota.

Mr. PETTIGREW. I wish to say that these are agricultural lands. As to the Coeur d'Alene reservation, under this same bill the settler is required to pay but $1.50 an acre, although we have agreed to pay over $500,000 for less than 200,000 acres, and I can see no reason why there should be any discrimination against the lands on the Sisseton and Wahpeton reservations.

Mr. DAWES, Let me read a little from this agreement:

In consideration for the lands ceded, sold, relinquished, and conveyed as aforesaid, the United States stipulates and agrees to pay to Sisseton and Wahpeton bands of Dakota or Sioux Indians, parties hereto, the sum of $2.50 per acre for each and every acre thereof.

Then it is agreed that the sum so paid shall be paid as provided in detail in the agreement. *Now, if we pay the Indian $2.50 an acre for this land and open it to settlement, the settler should be required to pay $2.50 an acre.*

Mr. PETTIGREW. I will answer the Senator from Massachusetts. *Under the agreement made heretofore with the Indians we have bought their lands and opened them to settlement under the homestead law at $1.25 per acre.* Under this bill we purchase the Coeur d'Alene reservation and pay $500,000 for 185,000 acres of land which is to be open to settlement at $1.50 per acre, and yet in the agreement with the Sissetons and Wahpetons this bill requires that the settler shall pay $2.50 an acre for lands which are purely agricultural and only suitable for settlement, and which I believe should be opened to settlement under the provisions of the homestead law.

There is no provision in this bill or in the ratification of any of these agreements which requires any settler to pay over a dollar and a half an acre, except in the land to be opened for settlement in the Sisseton and Wahpeton Reservation. I can see no reason why that exception should be drawn as to those lands. It is questionable whether they are as valuable as other lands which are to be opened under these agreements.

Mr. MORGAN. They are generally worth more than $2.50 an acre.

Mr. PETTIGREW. That is exceedingly doubtful, and I question whether they will be settled under the provisions of this proposed law, which requires the payment of $2.50 an acre.

Further than that, my amendment requires that sections 16 and 36 shall be donated for the purpose of supporting the common schools of the State of South Dakota. If that provision were rejected as to every

reservation in the State of South Dakota when we were admitted into the Union, we would have lost more than half of all the school lands donated to the State, which would be unjust and unfair, and inasmuch as we received no grant of swamp lands whatever–

Mr. DAWES. If the Senator will allow me, $2.50 an acre is not all we give to these Indians, for in article 3 of the agreement it is provided.

The United States stipulates and agrees to pay to the Sisseton and Wahpeton bands of Dakota or Sioux Indians, parties hereto, per capita, the sum of $342,778.37, being the amount found to be due certain members of said bands of Indians who served in the armies of the United States against their own people when at war with the United States.

So that we have to make an appropriation of $342,778.37 for these Indians in this bill. 22 Cong. Rec. 3457-3458 (1891).

Three days later, with the bill in its final form, the question concerning the price the settlers were to pay the United States government for the land was raised once more:

Mr. HOLMAN. . . .I would like to have the gentleman state the action taken in regard to the Sisseton lands.

Mr. PERKINS. I will say that the Senate amended the bill so that the lands should be opened to settlement only under the homestead laws of the United States, and the town-site laws, and the settlers are charged $2.50 per acre for the Sisseton and Wahpeton lands.

Mr. HOLMAN. For the whole of it?

Mr. PERKINS. For the whole of them.

Mr. HOLMAN. How is it as to the other lands?

Mr. PERKINS. *All are opened to settlement under the homestead law,* but the settlers are required to pay $1.50 per acre for the Coeur d'Alene lands, *and for the Fort Berthold and the Crow lands $1.50 an acre; and so with all the lands opened to settlement by the provisions of this bill except those acquired by the Sisseton and Wahpeton agreement, for which the settlers are to pay $2.50 per acre.*

Mr. HOLMAN. Now, in regard to the homestead provision. Is there any modification whatever in that?

Mr. PERKINS. None whatever; in fact, the Senate bill and the bill we have agreed upon is not as liberal in that particular as the bill we passed in the House. In the House we gave to those who had exercised the privilege of locating upon the prairies of the West under the homestead law, but who had subsequently lost their lands by contests, dry seasons, or misfortunes, the opportunity to take these lands in Oklahoma the same as those who had never settled upon public land under the homestead law; but it was thought by the Senate conferees that this right was extended under the recent act of Congress repealing the pre-emption law, and so we receded from our disagreement.

Mr. HOLMAN. The balance of the homestead law, so far as applicable, except the section repealed, 2301, is covered by the bill.

Mr. PERKINS. The provisions of the homestead law are respected and upheld as to all the lands covered by the bill except as we amend the amendment of the Senate so as to preserve to the late Union soldiers and sailors the special privileges conferred upon them under the homestead law except as they pay the same price as the other settlers–

Mr. HOLMAN. Then except as to the last feature, which is expressed in the homestead law, the other laws are applied.

Mr. PERKINS. Except as before suggested, the lands are to be paid for by the settlers.

Mr. MANSUR. You charge the settlers $2.50 an acre for this land, which is a very poor illustration of the doctrine that you held that you wanted these lands for the poor.

Mr. PERKINS. *We paid the Indians for* them. *We paid for the Sisseton and Wahpeton lands $2.50 an acre.* It is said they are worth more than that. The commissioners who visited those Indians and conducted the *treaty* believed that they were worth $2.50 an acre, and consented to pay the Indians that price for them. In the Senate, as well as in the House, it was thought right to

charge the settlers $2.50 an acre for them, and the bill as it passed the House charged the settlers for the lands the price paid the Indians for them. 22 Cong. Rec. 3784 (1891). [13]

The final reference to the Sisseton-Wahpeton Agreement was made on the day of passage:

> Mr. GORMAN. Now, do I understand the Senator from Massachusetts to say that provision is made here for the Government to charge the settler the same amount per acre that Government has paid to the Indian for this land?
> Mr. DAWES. Mr. President, the bill on its face, as nearly as it can be ascertained (there being some indefinite appropriations connected with it), is about $16,000,000. The Indian appropriation bill proper contains about $7,200,000. *The remainder of the bill is made up of the other appropriations necessary to carry out the agreements that were made with Indians for the surrender of a large portion of their reservations to the public domain. In the main it has cost the United States between $1.25 and $1.50 an acre for some ten or eleven million acres of land. All this land is opened by this bill to settlement as part of the public domain upon the payment by the settler of $1.50 an acre, for all except that which was obtained from the Sisseton and Wahpeton reservation, which is open to settlement at $2.50 an acre, because the United States gave the Indians for the surrender $2.50 per acre.* 22 Cong. Rec. 3879 (1891) (emphasis added).

13. The only other reference to the Sisseton-Wahpeton Agreement in the *Congressional Record* involved an emergency clause:

> Mr. COCKRELL. I would like to ask the Senator in charge of the bill what is the change made in the amendment numbered 39?
> Mr DAWES. The report adds at the end of the amendment the words "to be immediately available." That is all the difference there is.
> Mr. COCKRELL. "To be immediately available?"
> Mr. DAWES. Yes
> Mr. COCKRELL. Instead of waiting until the end of the fiscal year?
> Mr. DAWES. Exactly. Because those Indians were represented at the Department and by Senators here to be in a very distressed condition, it was thought better that the appropriation should be available in the spring rather than to wait until July. That is all. 22 Cong. Rec. 3877 (1891).

The Bill passed the Senate a few minutes later and therefore, as the Court can see, very little specific information exists in the *Congressional Record* to aid this Court in the construction of the specific Act under consideration. However, as exemplified by the last remark of Senator Dawes, there does exist information from which Petitioner thinks an accurate insight can be gained into the continuation of the whole cession policy in general and its necessary effects on the boundaries of any reservation or portions thereof and in this respect aid the Court to consider the Sisseton-Wahpeton Act in its proper historical perspective. As Senator Dawes stated:

> Mr. DAWES. Mr. President, the bill on its face, as nearly as it can be ascertained (there being some indefinite appropriations connected with it), is about $16,000,000. The Indian appropriation bill proper contains about $7,200,000. The remainder of the bill is made up of the other appropriations necessary to carry out the agreements that were made with Indians *for the surrender of a large portion of their reservations to the public domain.* In the main it has cost the United States between $1.25 and $1.50 an acre for some ten or eleven million acres of land. *All this land is opened by this bill to settlement as part of the public domain* upon the payment by the settler of $1.50 an acre, for all except that which was obtained from the Sisseton and Wahpeton reservation, which is open to settlement at $2.50 an acre, because the United States gave the Indians *for the surrender* $2.50 an acre. 22 Cong. Rec. 3879 (1891) (emphasis added).

In this one paragraph, the most influential and knowledgeable man that has ever participated in Indian Affairs in Congress sums up precisely and in clear and unambiguous language the sum total of congressional policy with respect to any cession agreement—and irrespective of whether it was tailored to conform to the Dawes Act of 1887. *The thrust of the whole process was to simply obtain a surrender of a reservation or a portion thereof to the public domain for the purpose of providing additional land to homesteaders, or in a more shorthand descriptive terminology, to "open the reservation" to homesteading.* More important than this singular remark however, is the fact that the exxence of what is stated therein is repeatedly and expressly confirmed throughout the 250 other pages of the *Congressional Record* concerned with this Indian appropriation bill. Of course the 1887 Dawes Act was directly and indirectly involved. Most importantly, the individual members of the tribe were thereby assured of some permanent remnant of land via allotment and no "openings" or "cessions" would be had in derogation thereof.

But the crux of the whole process remained the same as the remarks of the other members of Congress indicate:

> Mr. PERKINS. Mr. Speaker, this bill is an important one. All the pending agreements or treaties for the *purchase of Indian lands* are ratified and confirmed by the provisions of this bill. Some of these agreements have been pending for Congressional action for many months. They had been negotiated with care, by mean of ability and integrity, and good faith with the Indians, as well as justice to the pioneer settlers, demanded their approval and ratification.
>
> The bill carries the largest appropriation ever carried by an Indian appropriation bill, but *it extinguishes the Indian title to a great domain and opens it to settlement* by the hardy and progressive pioneers who in a short period of time will convert it into the abiding place of

> patriotic and enlightened homes, adding much to the development and prosperity of our common country. 22 Cong. Rec. 3784 (1891) (emphasis added).
>
> Mr. GORMAN. . . . . Now, Mr. President, I think I have the right to characterize this as the most extraordinary proceeding. After spending the time here from the 1st Monday of December, during the whole Congress, in considering public matters, *we come for the first time to an Indian appropriation bill to deal with seven or eight treaties, to ratify them, to make provision for the disposal of the public lands that we have acquired by those treaties by the million acres,* in the very last hours of the session, when no Senator of the Committee on Appropriations or in this body can possibly know what this bill means, or how much is involved, or what will be the result of the *disposition of the public lands. . .*
>
> The amount of money that the Senator from Massachusetts says is involved in these treaties is over $6,000,000. That is only a small part of it. The questions *how far the public lands have been disposed of* and in what way I have no doubt the Senator has investigated and the members of the Indian Committee have investigated to the very best of their ability in the time they have had to work, far into the night, to try to get the bill into shape.
>
> Mr. MORGAN. . . .We had better proceed to ratify these treaties, these agreements, because the main part of the agreements not only relates to the *disposition of the public lands amongst the settlers,* but the agreements are all drawn up, they are signed by one Indian and another and another until we say that we have a majority of two-thirds or three-fourths—I forget which it is—of all these different tribes. The agreements are all embodied in writing. There is nothing to be done about them.
>
> When we adopt this bill the statute will not change all these agreements. We do not pretend to make any modification or amendment of the agreements themselves. We merely ratify those, and then we take the estate we have acquired in this way, and after providing for the payment of the money, or whatever it is we have agreed to pay these Indians, *we take these landed estates and parcel and divide them out among*

> *the people in a fashion that we think is the most conducive to the occupancy of that country* by a n honest, laborious, earnest, and faithful set of people. . . . Mr. CALL. . . .They are intended to afford an outlet for the great ma ss of our people who are suffering from the economies which have existed during the existence of the Government. They are a great relief to the people, and they should be *opened for settlement* at the earliest possible day. 22 Cong. Rec. 3454 .3455 (1891) (emphasis added).
>
> Mr. GORMAN. Mr. President, I stated last night that, for the first time, so far as I know, in the history of legislation we find seven or eight treaties to be ratified tacked on an appropriation bill, which came in at so late an hour of the session that no member of the Committee on Appropriations, so far as I know, other than the Senator from Massachusetts, who is the chairman of the Committee on Indian Affairs and who had considered nearly all these questions in separate bills, can tell the Senate what is contained in the proposition. Of course we know that if these treaties are ratified we must appropriate $6,000,000 and *make provision for the disposition of from three to five or six million acres of the public domain; but it is done in such a way that I can not explain it to the Senator.* 22 Cong. Rec. 3527 (1891) (emphasis added).

In this respect one would expect to find the position of Petitioner supported in the text of, and documents relating to, each of the separate cession agreements. After all, Senator Dawes and the other members of Congress had explicitly referred to and considered the ratification of the agreements would restore so many acres of land to the "public domain." [14] Certainly, in no instance is there any indication from any member of Congress to infer otherwise. Admittedly, each of the

14. See, the specific remarks of the Commissioner of Indian Affairs attributing the same effect to the Sisseton–Wahpeton Agreement, *supra*, at 4, 5.

agreements were, as Senator Dawes stated, "agreements made with these Indians by which they have agreed to surrender to the United States about ten million acres of land upon *different* terms agreed to with different tribes of Indians." 22 Cong. Rec. 3453 (1891). And the terms of the agreements did vary as indicated by the comments of Senator Sanders.

> Mr. SANDERS. . . .I regret as much as any one that these agreements have come here in the shape they have. There are no two of them alike, although they were all prepared in the Indian Office in Washington. *Their crudeness would not justify the suspicion that they had been written by lawyers familiar with this subject.* The treaties themselves, as to that which is purchased by the United States, vary, and I desire to describe them briefly.
>
> In some of the agreements all lands within given exterior lines are sold by the Indians to the United States. *This sometimes is all the land they own, but generally is only a part of the reservation.* Second, in other treaties all lands are sold that have not been allotted to Indians in severalty, and as to these lands that are allotted a deduction is made. Third, there is here another class of agreements where all lands are sold except those which have been allotted and those which shall be allotted hereafter, and the time is prescribed in which the allotment shall transpire. 22 Cong. Rec. 3547 (1891) (emphasis added).

But in terms of the issue before this Court, the effect of ratification remained the same–irrespective of the fact that the Sisseton-Wahpeton cession had been tailored to the Dawes Act.

Unfortunately, allocation of time and resources do not permit Petitioner to examine and present the documentation and surrounding circumstances of each of the other pure cession agreements which contain material relevant to the

determination of the issue herein. However, for purposes of a general discussion and clarification, in addition to substantiating our position with respect to the continuance of the crux of the cession policy as modified by the Dawes Act, in general, the agreement with the Crow Tribe is deserving of some analysis.

In the first instance, the 1890 agreement with the Crow Tribe of Indians is of the type wherein only a portion of the unallotted land of the reservation was sold to the United States; in this respect the situation is on nearly "all fours" with the hypothetical partial opening set forth at 9-12, *supra*. Hopefully, it also should serve to establish some sort of historical perspective to aid this Court in considering the more difficult (*See*12-13, *supra*) but in all respects analagous situation when all of the unallotted land of a reservation is opened at once, as in the instant case.

C. THE LEGISLATIVE HISTORY AND SURROUNDING CIRCUMSTANCES OF THE SUM CERTAIN CESSION AGREEMENT OF THE CROW TRIBE, WHICH WAS RATIFIED BY CONGRESS ON THE SAME DAY, IN THE SAME BILL AS THE SISSETON-WAHPETON AGREEMENT, BUT WHICH WAS NOT TAILORED TO THE DAWES ACT OF 1887, CONCLUSIVELY ESTABLISH THAT CONGRESS DID NOT ALTER THE FUNDAMENTAL PRECEPT OF THE CESSION AGREEMENTS.

1. General Background And Similarity.

The history of the Crow negotiations follows the same general pattern as the Sisseton-Wahpeton and others. The areas bordering the western portion of the reservation became populated and certain citizens began to lobby for the opening of a portion thereof. Eventually, Congress responded by enacting authorization providing:

> That the Secretary of the Interior is authorized and directed to appoint a commission consisting of three discreet persons, whose duty it shall be to negotiate with the Crow Indians for a surrender to the United States of all that portion of the reservation in Montana, or so much thereof as they will consent to surrender, . . . and to report to Congress the result of any such negotiation. But no agreement for any such surrender shall be valid until ratified by Congress. 21 Cong. Rec. 8778 (1890).[15]

As was the case in the Sisseton-Wahpeton negotiations, a portion of the Crow Reservation was allegedly a "barrier to settlement" and a "positive detriment" to the people of the state, as indicated in the House and Senate Reports:

> It will thus be seen that on the north, the west, and the south, this occupied portion of the Crow Reservation is surrounded by thrifty settlements of people devoted to the development of the resources of the contiguous country. This portion of the reservation constitutes a *barrier*, separating the people of the Yellowstone Valley from the settlements south of the reservation, and is, therefore, not only unproductive, but in its *present* condition, *under the jurisdiction of* the General Government *and not subject to settlement in any way*, this west end of the Crow Reservation is a positive detriment to the people of Montana, of no value whatever to the Crow Indian tribe. H.R. Rep. No. 80, 51st Cong., 1st Sess. 2 (1890).

Pursuant to the authorization, the Secretary of the Interior immediately dispatched a Commission that with all due diligence procured an agreement with the members of the Crow Tribe on December 8, 1890. The transcript of the negotiations, while not as lengthy, contained remarks similar to the

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15. Earlier negotiations with members of the Crow Tribe were attempted but unsuccessful.

Sisseton-Wahpeton transcript:

> Mr. RICHARDSON. . . .The Great Father has sent us here on a mission: that mission is to talk to you about *buying a part of your land.* He desires to purchase a portion of your reservation for which he thinks you have little use; if he did not think so he would not have sent us. . . .Now the Great Father wants to *buy that land* and take the money and give it all to the Indians in various ways. . . .S. Exec. Doc. No. 43, 51st Cong., 2d Sess. 10 (1891) (emphasis added).

Some of the members of the Crow Tribe opposed the sale and others did not. Both continually referred to the business at hand in the same terminology:

> OLD DOG. . . .If they *sell you the reservation* don't let any cattlemen on it, except Williams. . .
> PLENTY COOS. I want the commission, if I give my consent to *sell the land,* to promise to fix the Indians over on the Clarke's Ford, build them ditches and houses and fences, *those that remain there.* If white men come and settle close to the Indians I want good white men for neighbors. You see these people here, I could hold them a good while but they will do as the Great Father wishes. How many cattle will we get? S. Exec. Doc. No. 43, 51st Cong., 2d Sess. 12-13 (1891) (emphasis added).

The operative language of the agreement itself was simply:

> We, the undersigned, adult male Indians of the Crow tribe now residing on the Crow Indian Reservation, in the State of Montana, do this 8th day of December, A.D. 1890, hereby agree *to dispose of and sell to the Government* of the United States, for certain considerations hereinafter mentioned, all that portion of the Crow Indian Reservation in the State of Montana, lying west and South of the following lines, to wit–S. Exec. Doc. No. 43, 51st Cong., 2d Sess. 16 (1891) (emphasis added).

It did not even contain the term "public domain." Yet, in his Annual Report to the Secretary of the Interior for 1891, the Commissioner of Indian Affairs also stated "the ratification of the agreement by the Act of March 3, 1891 (26 Stat., 989) *restored to the public domain*. . . from the Crow Reservation, Montana, about 1,800,000 acres." Report of the Commissioner of Indian Affairs, 44 (1891) (emphasis added). Admittedly, "Congress was fully aware of the means by which termination could be effected. . ." *Mattz* v. *Arnett,* 412 U.S. 481 (1973). But it did not alter the original Crow agreement to conform to any standard ". . . which *expressly* provided for the termination of the reservation. . . and did so in unequivocal terms." *Mattz, supra,* 412 U.S. at (emphasis added).

President Benjamin Harrison, as in the Sisseton-Wahpeton case, transmitted the agreement and accompanying documents to the Senate and House of Representatives on January 19, 1891. 22 Cong. Rec. 1550 (1891). The agreement was reported out of the House Committee on Indian Affairs on February 5, 1891, and in this respect was not altered in any way. The report simply referred to a "cession of land" and the "land embraced in this cession":

> The Commissioners estimate the quantity of *land embraced in the cession* at 1,800,000 acres, the price agreed to be paid being $946,000, or about 52 1/2 cents per acre. The Secretary of the Interior, in a letter dated January 17, 1891, transmitting to the treaty, together with the recommendations of the Commissioner of Indian Affairs to the President recommends the confirmation of the treaty. In a letter to the Secretary of the Interior dated January 16, the Commissioner of Indian Affairs in strong terms recommends that the treaty be confirmed, and in his letter sets forth substantial reasons why the good of the Indians and interest of the people of the United States would be served by the prompt ratification of the

> agreement. . .When *the cession of land* now proposed shall have been made. . . .H.R. Rep. No. 3700, 51st Cong., 2d Sess. 1, 4 (1891) (emphasis added).

On the floor of the House and Senate the agreement was again simply referred to as a "cession" or "sale" of surplus "land":

> Mr. SANDERS. The agreement is that the Crow Indians sell to us *all the lands within the limits described, except such lands as had at the date of the agreement been allotted to Indians.* This amendment provides that when we have *bought the land, paid for it,* and surveyed it, and, by proclamation of the President, *opened it and settled it,* under what is facetiously called by the Senator from Massachusetts [Mr. DAWES] the homestead law, *buying it* for $1 an acre, it shall be further reserved from every white man, from every citizen of the United States, until, within sixty days, Indians who have got their money from the United States can go on it and take up such of it as they choose. 22 Cong. Rec. 3548 (1891) (emphasis added).

With the agreement in its final form, as in the Sisseton-Wahpeton case, Senator Dawes stated:

> Mr. DAWES. Mr. President, the bill on its face, as nearly as it can be ascertained (there being some indefinite appropriations connected with it), is about $16,000,000. The Indian appropriation bill proper contains about $7,200,000. The remainder of the bill is made up of the other appropriations necessary to carry out the agreements that were made with Indians for the *surrender of a large portion of their reservations to the public domain.* In the main it has cost the United States between $1.25 and $1.50 an acre for some ten or eleven million acres of land. All this land is opened by this bill to settlement as part of the *public domain* upon the payment by the settler of $1.50 an acre, for all except that which was obtained from the Sisseton and Wahpeton reservation, which is open to settlement at $2.50 an acre, because the United States gave the Indians for the surrender $2.50 per acre. 22 Cong. Rec. 3879 (1891) (emphasis added).

The agreement was ratified and became sections 31-34 of the Act of March 3, 1891 (26 Stat. 989).

Not one section of the Crow Act contains the term "public domain." There is no express or unequivocal terminology inserted by Congress–only the operative terminology of "sell and dispose." Of course no one could ever question what effect the Crow Agreement had on the boundaries of the Crow Reservation for the agreement was concerned *only* with a portion of the reservation–synonymous in all respects with the hypothetical partial opening discussed at 9-12, *supra*. Since a portion of the reservation was to remain intact it *necessarily* had to be delineated from the ceded portion. Thus the agreement on its face provided:

> SEC. 33. That the sum of seven thousand five hundred dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, *for the survey of the boundary line between the Crow Reservation and the lands ceded by said agreement,* . . . Crow Act of March 3, 1891 §33, 26 Stat. 1042 (1891) (emphasis added).

Similarly, the legislative history of the Crow agreement is replete with references such as the statement of the Commissioner of Indian Affairs contained in H.R. Rep. No. 3700 ". . . I have provided, both in the bill and in the item, for the cost of the survey of the *boundary line separating the ceded lands from the diminished reservation.* . . ." H.R. Rep. No. 3700, 51st Cong., 2d Sess. 4 (1891) (emphasis added). [10]

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10. After reservations were surveyed and subdivided into counties, such metes and bounds descriptions and general surveys of the boundaries of reservations were no longer necessary. If the unallotted land in a particular outlying county was ceded, the agreement could rely upon the description of the county.

In essence, the evidence of the congressional determination to terminate or disestablish in this case had to be, of *sheer necessity*, both ". . .on the face of the act. . ." and ". . .clear from the surrounding circumstances and legislative history. . . ." *Mattz, supra*, at .

Assume for a moment, however, that all of the unallotted lands of the Crow Reservation were the subject of this agreement. Logically, one would have an agreement to sell and dispose of all the unallotted lands within the Crow Reservation–*without the previously necessary* discussion of new boundaries and remained diminished reservation ". . .on the face of the act. . ." or in the ". . .surrounding circumstances and legislative history. . ." *Mattz, supra. There would no longer be a remaining or diminished reservation or reservation boundaries and hence no reason to discuss them.* All that would remain would be allotments situated on the newly created public domain–in effect, the same precise situation presented in the Sisseton-Wahpeton materials.

The argument of Petitioner is soundly supported in this respect by the treatment actually accorded those members of the Crow Tribe already allotted or desirous of taking allotments in the ceded portion of the Crow Reservation. On the first day of the council, Commissioner Richardson explicitly told the members of the Crow Tribe that the "Great Father":

> . . .has told us to give you $830,000 for this part of the reservation, and Indians who stay on ceded lands, if they wish to remain, will have all the rights and privileges of the tribe. . . .He proposes also to take a lot of money and pay the Indians that are on the land we want to buy for their improvements, so that if they come over on this part of the reservation and take up irrigated land they will be better off here than there *but any Indian that wants to stay there can do so.* S.

> Exec. Doc. No. 43, 5lst Cong., 2d Sess. 10 (1891) (emphasis added);

and the members of the tribe understood the ramifications of having their allotments so situated:

> PLENTY COOS. I want the commission, if I give my consent to sell the land, to promise to fix the Indians over on the Clarke's Ford, build them ditches and houses and fences, *those that remain there.* If white men come and settle close to the Indians I want good white men for neighbors. You see these people here, I could hold them a good while but they will do as the Great Father wishes.S. Exec. Doc. No. 43, 51st Cong., 2d Sess. 13 (1891) (emphasis added).

In their report to the Secretary of the Interior, the members of the Commission reiterated that:

> Many of the Crows have had land allotted to them in severalty. During the past year the allotment agent in charge of this work on the reservation located *one hundred and thirty six allotments* on Clarke's Fork River. The Indians on these allotments strongly opposed the sale because it would leave them *outside of the retained portion of the reserve.* When the system of irrigation provided for in the agreement is in operation, large tracts in the valleys of the Little Horn and Big Horn Rivers will be made available for allotment, and as an inducement for the *Indians who live on the ceded portion to move upon the part retained* the agreement provides, in Section 11, that they shall have the right to surrender their allotments and select a new one upon the same terms at any time within three years. S. Exec. Doc. No. 43, 51st Cong., 2d Sess. 8, 9 (1891) (emphasis added).

And Section 11 of the agreement reflected this concern:

> That all lands upon that portion of the reservation

> to be herein ceded, which prior to the date of this agreement have been allotted in severalty to Indians of the Crow tribe, shall be retained and enjoyed by them: *Provided, however,* That such Indians shall have the right at any time within three years to surrender his or her allotment and select a new allotment *within the retained reservation,* upon the same terms and conditions as were prescribed in selecting the first allotment. *It is further provided,* That every Indian who shall surrender an allotment within the time specified that has improvements upon it shall have like improvements made for him upon the new allotment, and for this purpose the sum of $5,000, or so much of it as may be necessary, is hereby appropriated and set apart. S. Exec. Doc. No. 43, 51st Cong., 2d Sess. 17 (1891) (emphasis added).

On the floor of the Senate a specific amendment even extending this provision for 60 days was proposed by Senator Pettigrew and incorporated into the final act:

> Mr. PETTIGREW. . . .Further than that, as I am informed, under the existing laws these Indians can take selection in severalty upon the land ceded in this treaty; in my amendment, as I said before, simply extends that time for 60 days *after* this bill becomes a law. 22 Cong. Rec. 3549 (1891) (emphasis added).

Petitioner would submit Congress was not concerned with the fact that the members of the whole of the Sisseton-Wahpeton tribe would soon be situated on allotments in the midst of the public domain any more than it was concerned with the fact that some of the members of the Crow tribe would soon be so situated. The salient effect, if not the purpose of, both agreements was the same – *the acquisition of surplus Indian lands to be restored to the public domain for the purpose of providing homes to actual settlers.* This was the case in the pure cession agreement of the Crow tribe and it was still the case in the cession agreement of the Sisseton-Wahpeton

tribe – irrespective of the fact that it had been tailored to the Dawes Act. If the allotment provision of the 1887 Dawes Act in the Sisseton-Wahpeton agreement seems inconsistent with the restoration of the remainder of the Lake Traverse Reservation to the public domain, this inconsistency certainly cannot be substantiated by a comparison with the allotments left on the public domain in the Crow situation.

2. Additional Comparison And Support.

There is further support for the position of Petitioner that the Sisseton-Wahpeton agreement was intended to have the same effect on the status of the Lake Traverse Reservation as the Crow agreement undeniably had on that portion of the Crow Reservation

(a) Homestead amendment.

The Sisseton-Wahpeton agreement was amended by Congress so that the lands thereby acquired by the United States would be subject only "to entry and settlement under the homestead and townsite laws of the United States. . ." Crow Act of March 3, 1891 §30, 26 Stat. 1039 (1891). The Crow agreement was similarly amended to provide that whenever by operation of law or the Proclamation of the President the lands were to be "opened to settlement" that they be disposed of ". . .to actual settlers only, under the provisions of the homestead laws. . . ." Crow Act of March 3, 1891 §34, 26 Stat. 1043 (1891).

There is no more reason to assume that Congress intended for the settlers in South Dakota to be settling "within the boundaries" of a reservation any more than it could have intended that the settlers in Montana be so situated. For this situation to exist would seem even more incredulous when one considers that these were the *same* Senators and Congressmen.

considering, commenting on, and similarly amending both agreements at the *same* time, incorporating both agreements into the *same* bill, and passing that bill the *same* day—*without ever mentioning* on the floor or in the reports that the settlers in one state would be then on the public domain outside the boundaries of a reservation, while the settlers in the other state would still be situated inside the boundaries of the reservation on something less than the public domain, to say the least. This is especially so, in light of the statements in the *Congressional Record* and other documents that, in this respect, all the agreements were to have the same effect.

(b) Terminology.

In both instances, the United States Government, through a duly authorized commission, negotiated and obtained a cession of land to the United States Government from the members of the respective tribes. Although the operative language of the Crow Act contained only the "sell and dispose" terminology, while the Sisseton-Wahpeton agreement contained the stronger "cede, sell, relinguish and convey to the United States all their claim, right, title, and interest in and to" terminology, numerous references in both Acts refer to the basic transaction as one and the same:

> . . . in consideration of the *cession* . . . portions of the reservation to be herein *ceded* . . . this *cession* of lands . . . said *ceded* portion . . . *cession* of lands . . . lands *ceded* . . . territory by said agreement *ceded* . . . *within the limits of the ceded* portion . . . Crow Act of March 3, 1891 §§31, 33, 34, 26 Stat. 1039-1042, 1043 (1891) (emphasis added).

> . . . lands *ceded* . . . agreement *ceded* . . . the *cession*, sale, relinguishment . . . lands by said agreement *ceded* . . . lands by said agreement *ceded* . . . lands by said agreement *ceded* . . . Sisseton-Wahpeton Act of March 3, 1891 §§26, 27, 28, 30, 26 Stat. 1035-1039 (1891) (emphasis added).

Similarly, the Crow Act also contained the same "open to settlement" terminology, Crow Act of March 3, 1891 §§33, 34, 35, 26 Stat. 1042, 1043 (1891), and both Acts also variously referred to the transaction as a "sale" or a "disposal."

More importantly, both of the cessions were to the United States Government in return for a *sum certain*. The only difference was that pursuant to the Crow Act most of the money was to be spent on projects with the remainder distributed per capita, while pursuant to the Sisseton-Wahpeton agreement, because of the Dawes Act, the money was to be deposited in the Treasury to the credit of the tribe. Certainly Congress did not think this a significant distinction.

The fact that the Sisseton-Wahpeton Act was a cession agreement between the United States Government and the members of the Sisseton-Wahpeton Tribe for a sum certain was evidently overlooked and miscontrued in the opinion of the court below.[17]

(c) Congress and the Office of Indian Affairs.

The fact the members of Congress and individuals in the various agencies of the United States Government all attributed a similar "effect" to both the Sisseton-Wahpeton and Crow agreements would seem to Petitioner to also strongly support the position that both agreements were intended to similarly disestablish and restore to the public domain those portions of the reservations respectively affected. Although certain aspects of this phase of the Sisseton-Wahpeton-Crow comparison have been discussed elsewhere, they will of necessity have to be discussed briefly at this point.

Primarily, Petitioner is referring to the fact that from the

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17. See the discussion of the opinion of the court below, *infra*, at 78-83.

moment the agreements were tacked onto the Indian Appropriation Bill until they received final passage, each and every member of Congress consistently attributed the same basic and fundamental effect to both the Sisseton-Wahpeton and Crow agreements. *See* the extended discussion set forth at 48-56 *supra*. Of course the most succinct passage in the *Congressional Record* confirming this position was that of Senator Dawes, already referred to several times:

> Mr. DAWES. Mr. President, the bill on its face, as nearly as it can be ascertained (there being some indefinite appropriations connected with it), is almost $16,000,000. The Indian appropriation bill proper contains about $7,200,000. *The remainder of the bill is made up of the other appropriations necessary to carry out the agreements that were made with Indians for the surrender of a large portion of their reservations to the public domain.* In the main it has cost the United States between $1.25 and $1.50 an acre for some ten or eleven million acres of land. *All this land is opened by this bill to settlement as part of the public domain* upon the payment by the settler of $1.50 an acre, for all except that which was obtained from the Sisseton and Wahpeton reservation ., which is open to settlement at $2.50 an acre, because the United States gave the Indians for the surrender of $2.50 per acre. 22 Cong. Rec. 3879 (1891) (emphasis added).

Petitioner has also previously alluded to the fact that this last gentlemen was perhaps the most singularly influential and knowledgeable Senator ever to participate in Indian Affairs. Indeed, he authored the very legislation that provided for the Sisseton-Wahpeton negotiations and set the format for the provisions of the agreement – the Dawes Act of 1887. As a matter of fact, the whole Senate relied on him to compile and put all of these same agreements in a form acceptable to the Senate. As the *Congressional Record* indicates, Senator Dawes was intensely familiar with not only the Sisseton-Wahpeton and

Crow Agreements, but also each of the other agreements:

> Mr. GORMAN. . . . I have no doubt the Senator has investigated and the members of the Indian Committee have investigated to the very best of their ability in the time they have had to work, far into the night, to try to get the bill into shape. . . . 22 Cong. Rec. 3454 (1891).
> Mr. CALL. . . . I believe the provisions which the Senator from Massachusetts [Mr. DAWES], to whom the bill was referred, has placed upon it are wise and are as good probably as could result from a more prolonged consideration of the bill and discussion of it in the Senate. . . .I wish to say, Mr. President, that so far as the subcommittee was concerned, and so far as the Senator from Massachusetts [Mr. DAWES] is concerned, who did the principal labor in the examination of these provisions of the bill, of these agreements, and of all the portions of the bill which are provided for carrying them into effect, they gave to the consideration of these provisions all the time that was possible to have been given to them since the bill was reported to the Senate and referred to them. . . . .22 Cong. Rec. 3455, 3456 (1891).
> Mr. GORMAN. . . . No member of the Committee on Appropriations, so far as I know, other than the Senator from Massachusetts, who is the chairman of the Committee on Indian Affairs and who had considered nearly all of these questions in separate bills, can tell the Senate what is contained in the proposition. Of course we know that if these treaties are ratified we must appropriate $6,000,000 and make provision for the disposition of from three to five or six million acres of the public domain; but it is done in such a way that I cannot explain it to the Senator. . . [B]ut for the familiarity of the distinguished Senator from Massachusetts with this subject, you would have had a bill to consider that would simply have been an outrage, one which would have meant nothing, and it was only after nights of labor by him as a subcommittee that it was placed in the shape in which it now is. . . . I have watched him during the day and night as he has tried to perfect this measure. Great credit is due him, and I for

one absolve him from any criticism hereafter .... 22 Cong. Rec. 3527, 3880 (1891).

As this Court has stated, "... it is the sponsors that we look to when the meaning of the statutory words is in doubt ..." *N.L.R.B.* v. *Fruit and Vegetable Packers*, 377 U.S. 58, 66 (1964). In this respect, Senator Dawes' role emerges as not only the sponsor of the Dawes Act of 1887, but also the sponsor, for all intents and purposes, of the agreements in their final form in the Act of March 3, 1891. Petitioner would submit that to assume a Senator in this position erroneously construed this fundamental aspect of the agreements would effectively negate the portion of the *Mattz* decision which established that a congressional determination to disestablish or terminate could be made clear from the "... surrounding circumstances and legislative history...." *Mattz*, *supra*, at . This is especially so in light of the fact that the other members of Congress not only concurred in his analysis but also expressed similar views. Congress had spoken, and although the measure was a "procedural monster," Mr. Call put the issue in proper perspective immediately before passage:

> Mr. CALL. ... Whatever just complaint there might be for bringing into the Senate at so late a period a bill with so many items upon it and with these agreements, *there is nothing in this bill that is not in accordance with existing law*. These agreements have all been ratified and acted upon by both branches of Congress, Senate and House of Representatives, with the exception of two, and those have undergone the most deliberate and searching examination and argument in the Senate, and by decided majorities have been put upon the bill. So the criticism is in these respects unfounded.
>
> All the provisions in this bill relating to the *settlement of the public lands are but the application of the existing law in regard to such settlement*...

> The appropriations made in the bill for the *release* of the Indian claim of right to this land is in accordance with the *established policy of the Government* and has been demanded by a large majority of both Houses of Congress. The amount is reimbursed, so that it is but a nominal appropriation. The entire amount comes back into the Treasury. It is nothing but a loan or the public credit of the United States to the accomplishment of these purposes and in no respect touches the taxation upon the people of this country.
> objection found to this bill which has no just foundation. *All the legislation to the bill is but the application of the existing law upon the subject.*
>
> That is the condition of this bill. That it came here too late for it to have had prolonged examination in reference to all these items, and that every Senator could not fully comprehend them, is true; and that is all the criticism that can be made upon it.... 22 Cong. Rec. 3880-3881 (1891).

Finally, Petitioner has been unable to find anything in the entire legislative history of the Indian Appropriation Bill that can fairly be said to support an opposite conclusion. Even the miscellaneous documents introduced in the *Congressional Record* for debate on other issues raised by the Indian Appropriation Bill attribute this same fundamental effect to the actions of Congress in this respect. For example, on February 14, 1891, Congressman McCord, during a debate on Indian education, quoted from what he termed "a pamphlet on Indian Education, by General Thomas J. Morgan, the present able, intelligent, and efficient Commissioner of Indian Affairs." 22 Cong. Rec. 2699 (1891). One of the paragraphs therein stated:

> The second great economical fact is that the lands known as Indian reservations now set apart by the Government for Indian occupancy aggregate nearly 190,000 square miles. This land for the most part is uncultivated and unproductive. When the Indians shall

> have been properly educated, they will utilize a sufficient quantity of these lands for their own support and will *release the remainder, that it may be restored to the public domain* to become the foundation for innumerable happy homes; and thus will be added to the national wealth immense tracts of farming and grazing land and vast mineral resources, which will repay the nation more than one hundred fold for the amount which it is proposed shall be expended in Indian education. 22 Cong. Rec. 2700-2701 (1891) (emphasis added).

This was the "established policy" of the Government.

Petitioner would submit that one could not expcet a more unequivocal and probative illustration of the precise effect that the ratification of the agreements had on the Crow and Lake Traverse Reservations than the following excerpt from the 1891 Commissioner of Indian Affairs Annual Report to the Secretary of the Interior:

REDUCTION OF RESERVATIONS

> The work of *reducing the area* of the reservations, by extinguishing by purchase from the Indians their title to the land and its *restoration to the public domain*, has been carried forward rapidly, as is shown in the following detailed statements: . . . The ratification of agreements by the act of March 3, 1891 (26 Stats., 989), *restored to the public domain. . .from the Lake Traverse Reservation, South Dakota, about 660,000 acres, and from the Crow Reservation, Montana, about 1,800,000 acres*, a total of about 8,164,765 acres. . . .
>
> The ceded portion of the Fort Berthhold Reservation, North Dakota, consisting of about 1, 600,000 acres, has been thrown open to settlement by proclamation of the President.
>
> The ceded lands of the Coeur d'Alene Reservation, Idaho, were open to settlement from the date of the approval of the act.

> Allotments of land are being made on the Lake Traverse Reservation, South Dakota, and the Cheyenne and Arapaho Reservation, Oklahoma, and surveys are in progress on the Crow Reservation, Montana, and when they are completed and the terms of the Act ratifying the respective agreements with the Indians of the several reservations shall have been fully complied with, the unallotted or vacant land embraced within *the ceded portions will be thrown open to settlement*. Report of the Commissioner of Indian Affairs, 44, 45 (1891) (emphasis added).

Again, instead of treating the Sisseton-Wahpeton Act as an exception to the generally prevalent policy of the period, the Commissioner of Indian Affairs makes no distinction whatsoever between the Sisseton–Wahpeton agreement, which was tailored to the Dawes Act, and the Crow cession, which was not.

The Lake Traverse Reservation was equally subject to the general prefatory remarks of reducing the area of the reservation and restoring them to the public domain as was the Crow. Both were specifically stated to have restored so many thousands of acres to the *public domain* and both were soon to be "thrown open to settlement." Report of the Commissioner of Indian Affairs, 44 (1891).

In fact, Petitioner has been unable to substantiate that the Commissioner of Indian Affairs even considered that homesteaders on the six hundred and sixty thousand acres of land in South Dakota would be in a class separate and distinct from the homesteaders on the one million eight hundred thousand acres of land in Montana. Certainly such a conclusion could not be supported by the Commissioner's very general remarks on the very next page of his Annual Report:

RESERVATIONS SHOULD NOT BE REDUCED TOO RAPIDLY

> While perhaps it is possible to push such work too rapidly, I do not hesitate to say that *the ultimate destruction of the entire system of reservations* is inevitable. There is no place for it in our present condition of life, and it must go. *The millions of acres of Indian lands now lying absolutely unused are needed as homes for our rapidly increasing population and must be so utilized. Whatever right and title the Indians have in them is subject to and must yield to the demands of civilization.* Report of the Commissioner of Indian Affairs, 46 (1891) (emphasis added).

Nor would the fact that, after the openings, both the portion of the Crow Reservation and the whole of the Lake Traverse Reservation were similarly removed from the Office of Indian Affairs' published Map and Schedule showing the Reservations and Reservation areas in the United States, respectively lend any credence to such a distinction. Only in light of the above information can one really appreciate the significance of the following exchange:

> Mr. HAWLEY. I should like to ask the Senator for information, what is the opinion of the Secretary of the Interior and the Commissioner of Indian Affairs upon this bill, whether it is satisfactory to them.
> Mr. GORMAN. The Senator from Massachusetts can answer that question.
> Mr. DAWES. I never knew an appropriation bill satisfactory to a Department, but I think this bill is as nearly satisfactory to the Interior Department as the lot of humanity will permit.
> Mr. HAWLEY. I do not ask whether it is satisfactory as to amounts, but whether they believe in the purposes and principles and measures of the bill.
> Mr. DAWES. *The Interior Department is strongly in favor of the bill in its present shape.* 22 Cong. Rec. 3880 (1891) (emphasis added).

D. THE LEGISLATIVE HISTORY AND SURROUNDING CIRCUMSTANCES OF THE PURE CESSION AGREEMENTS, RATIFIED BY CONGRESS ON THE SAME DAY, IN THE SAME BILL AS THE SISSETON-WAHPETON AGREEMENT, SERVE TO PUT THE ISSUE IN A PROPER HISTORICAL PERSPECTIVE.

As Petitioner stated in the preface to the Sisseton-Wahpeton-Crow section, an allocation of time and resources did not permit any extended discussion or research into the history of each of the separate agreements ratified by the Act of March 3, 1891. Therefore, the Crow agreement was selected for the purpose of a more detailed comparison and discussion to support the position of Petitioner by putting the issue to be decided herein in its proper historical perspective. This selection should not be construed to indicate that an examination of thelegislative history and surrounding circumstances of the other agreements would have distorted this perspective in any way.

On the contrary, the Fort Berthhold agreement, for example, is on "all fours" with respect to the partial effect of the Crow agreement discussed *supra*, in addition to containing the identical operative "cede, sell, and relinquish to the United States all their right, title, and interest in and to" language of the Sisseton-Wahpeton agreement! Sisseton–Wahpeton Act of March 3, 1891 §23, 26 Stat. 1032 (1891). This is especially interesting in light of the preface to the Fort Berthold agreement:

> Witnesseth that whereas it is the *policy of the Government to reduce to proper size existing reservations* when entirely out of proportion to the number of Indians existing thereon, with the consent of the Indians, and upon just and fair terms; and whereas the Indians of the several tribes, parties hereto, have

> vastly more *land* in their present reservation than they need or will ever make use of, and are desirous of disposing of a portion thereof in order to obtain the means necessary to enable them to become wholly self-supporting by the cultivation of the soil and other pursuits of husbandry... Sisseton-Wahpeton Act of March 3, 1891 §23, 26 Stat. 1032 (1891) (emphasis added).

There is certainly no doubt that the 1891 Fort Berthold Act effectively disestablished approximately one half of the Fort Berthold Reservation. As recently as 1972, the Eighth Circuit Court of Appeals confirmed this in *City of New Town v. United States*, 454 F.2d 121 (C.A. 8 1972), in which neither the court nor the parties even questioned the status of the 1891 boundary.

Furthermore, even a cursory examination of the Fort Berthold legislative history throws considerable light on some of the reasons for not extending the Dawes Act of 1887 to each and every reservation. For example, when the Commissioner of Indian Affairs wrote the Secretary of Interior requesting that the residents of the Fort Berthold Reservation should not be made to await the "slower process" of the general allotment act he stated:

> Agent Gifford states that the Indians are looking for the ratification of the agreement with great anxiety and no little impatience, and that he finds it difficult to satisfy them with any explanation as to the cause of the delay. He says they are ready to take their lands in severalty as provided in the agreement, and that it would be an act of great injustice to them to compel them to await the slower process of the general allotment act to obtain the much-needed means to establish themselves in individual homes through the sale of their surplus lands. . . .
>
> In keeping with the policy of the Government, it provides for the allotment of lands in severalty to the Indians in quantity, and with a similar restriction regarding alienation, as is provided in the severalty act, except that it does not authorize the President to extend the non-alienation period beyond the twenty-five years specified.
>
> In all human probability it would be several years (two or three at least) before the Indians would derive any financial aid from the sale of their surplus lands if the general allotment act were applied in their case, but under the terms of the late agrement the money consideration would be forthcoming at once, and could be expended in assisting them in beginning life on their individual allotments. . .
>
> Furthermore, by the terms of this agreement a tract of land estimated to contain one million six hundred thousand acres is made available to white settlement. This also is an important consideration. . . .
>
> As there is no provision in the agreement for subdividing the diminished reservation for allotment, the cost of the surveys will have to be borne by the Government; but this is a very small matter, considering the mutual benefits to be derived from the vast cession of landsmade to the Government. The item to be inserted in the bill makes provision for the required surveys. Letter from Commissioner of Indian Affairs to Secretary of Interior, January 13, 1888, H.R. Rep. No. 82, 51st Cong., 1st Sess. 2, 3 (1890).

Therefore, because of this overlap, Petitioner would submit that the legislative history of each of the other agreements could be utilized by this Court to establish what precise principles of the cession era Congress intended to retain by tailoring certain cession agreements to conform with the provisions of the Dawes Act of 1887. Because the agreements ratified by the Act of March 3, 1891, were concluded both before and after the Dawes Act and the final debates were not until 1891, four years after theDawes Act had been in effect, all of these documents should contain material that could be very useful to this Court in deciding the issue in the instant case.

In this respect, Petitioner would most certainly be pleased to assist this Court at any time by filing a supplementary brief containing the legislative history and surrounding circumstances of each of the other agreements that were ratified by Congress in the Act of March 3, 1891, if this Court so desired. As Petitioner stated in the Petition for Writ of Certiorari, the importance of the issue which is presented herein is beyond question, and someone, somewhere,musttake the necessary time and action to authoritatively ascertain the intent of Congress at the turn of the century. Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, *United States ex rel. Feather v. Erickson* (1973) (hereinafter cited as Pet.)

II.

NEITHER THE OPINION OF THE COURT BELOW NOR THE RATIONALE OF SEYMOUR AND MATTZ IS CONTROLLING IN THE RESOLUTION OF THE STATUS OF THE LAKE TRAVERSE RESERVATION

A. THE OPINION OF THE COURT BELOW IS CLEARLY ERRONEOUS.

1. The Distinction.

Evidently the court below could not, ". . .against the glare of *Seymour* and the more recent judicial guidance in *Mattz, Condon* and *New Town* . . ." distinguish between the situations therein and the outright sale to the Government presentedin the instant case. Pet. App. A 8a-9a. Contrary to the plain language of the Act of March 3, 1891, the court nevertheless stated:

> Just as in the before mentioned three cases, the reservation here was *not* sold to the government outright but merely opened for settlement under the homestead laws and the 1887 general allotment plan. Pet. App. A 6a (emphasis added).

Petitioner would submit that this failure of the court below to recognize this fundamental distinction resulted in a decision which is clearly erroneous on its face and the attempt of the United States as *amicus curiae* to reconcile the conflict in its memorandum merely adds fuel to the fire. [18]

> Both forms of statute, with some variations in wording, were repeatedly used in opening reservations under the General Allotment Act. The earlier statutes tended to be written in terms of sale of unalloted land to the government for homestead purposes, while the later statutes often spoke of ceding unallotted land in trust to the government for homestead purposes.[3] Memorandum of United States as Amicus Curiae No. 73-1148. *DeCoteau v. District County Court for Tenth Judicial District*, 6 (1974).

All three of these statutes the United States cites in Note 3 in the above quotation as examples of one of ". . .only two of the techniques employed by the government to allow homesteading *within* Indian reservations. . ." *disestablished* portions of the reservations unequivocally and forever. Memorandum of United States as Amicus Curiae No. 73-1148, N.3 at 6,*DeCoteau v. District County Court for Tenth Judicial District* (1974) (emphasis as in original). How these three can then be ". . .*contrasted* with statutes terminating reservations, or changing or diminishing their boundaries,–" is beyond the comprehension of Petitioner! Memorandum of United States as

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18. Although the cited Memorandum for the United States as Amicus Curiae was submitted in the sister case of *DeCoteau v. District Court*, 211 N.W. 2d 843 (S.D. 1973), the United States therein addressed itself to the identical issue of the effect of the Act of March 3, 1891 on the boundaries of the Lake Traverse Reservation.

Amicus Curiae No. 73-1148, N.3 at 6, *DeCoteau v. District County Court for Tenth Judicial District* (1974) (emphasis added). In effect the United States has thereby not only strongly supported the position of Petitioner and cast considerable doubt on the validity of the decision below, but also essentially undermined the crux of its own argument.

In this light the 1963 position of the United States Attorney for South Dakota, with ". . .express approval of the Department of Justice at Washington, D. C., --" that this *same* act disestablished this *same* reservation would appear somewhat more persuasive. *DeMarrias v. State of South Dakota*, 319 F.2d 845, 847 (C.A. 8 1963), *aff'g* 206 F. Supp. 549 (D.S.D. 1962) (emphasis added).

2. The Glare Of Precedence.

The failure of the court below to even recognize a cession to the United States for a sum certain also exemplifies the criticism Petitioner has directed at the "recent decisions" of the Eighth Circuit Court of Appeals: namely, decisions in which a preoccupation with the "glare" of precedence and conformity of holdings has led to some rather te: uous results.

For example, in *City of New Town v. United States*, 454 F.2d 121 (C.A. 8 1972), the court was presented with the question of what effect, if any, a 1910 act opening a portion of the Fort Berthold Reservation had on the 1891 boundaries of that reservation. The court held that the 1891 boundaries were not affected and concluded that:

> . . .the boundaries of the Fort Berthold Reservation are those specified in the Act of March 3, 1891, 26 Stat. 1032, and that the Act of June 1, 1910, 36 Stat. 455 and subsequent Acts did not alter those boundaries.

City of New Town, supra at 127.

One year later, the court applied the rationale of *New Town, supra*, to a South Dakota reservation and held that the Cheyenne River Reservation was not diminished even though the legislation being construed therein referred *on its face* to the area unaffected by the act remaining as ". . .the diminished reservation. . .". *United States ex rel. Condon v. Erickson*, 478 F.2d 684 (C.A. 8 1973). The court termed the decision a "close question" and concluded that " diminished reservation" didn't really mean diminished reservation boundaries! *United States ex rel. Condon v. Erickson*,478 F.2d 687, 688 (C.A. 8 1973).

In the decision below the court cited *New Town* and *Condon* incessantly and held that the Act of March 3, 1891, had no affect on the boundaries of the Lake Traverse Reservation.

Petitioner finds it very interesting that the 1891 Act the court cited as establishing the boundaries of the Fort Berthold Reservation in *New Town, supra*, did so by disestablishing approximately one half of what had previously been the Fort Berthold Reservation, while the 1891 Act in the instant case had no affect on the boundaries of the Lake Traverse Reservation– interesting in that both acts were passed by the *same* Congress, in the *same* bill, on the *same* day!

In the absence of some rational explanation for what would *ipso facto* appear to be an irrational congressional mind, this situation should certainly have raised some questions. Yet the opinion of the court below is silent on the point. Had the court even realized the full import of the conflict it is doubtful that the Sisseton-Wahpeton agreement would have been treated as exemplifying the rule, rather than the exception. This is

especially so in light of a statement in the *Amicus* brief of the American Association of Indian Affairs submitted to the court below on behalf of the Sisseton-Wahpeton tribe wherein the unusual treatment allegedly accorded the Sisseton-Wahpeton agreement really manifests itself for the first time.

> Significantly, of the seven reservations opened by the Act of March 3, 1891,[7] the portion of land excluded from the reservation and the new boundaries resulting therefrom are specifically delineated by definite property lines for all but Lake Traverse.[8] Brief for the Association on American Indian Affairs, Inc., and the Sisseton-Wahpeton Sioux Tribe as Amicus Curiae at 10-11, *United States ex rel. Feather v. Erickson*, 489 F.2d 99 (C.A. 8 1973).

Although the revelation was made to support the position of the tribe(??) in an indirect manner surely the Sisseton-Wahpeton agreement should no longer have been viewed as a typical homesteading statute – the only one of seven statutes passed on the same day, in the same bill, by the same Congress, which did not diminish or extinguish reservations.[19] Indeed, this same preoccupation with generalizations should have led the court below to the opposite conclusion – especially if it had carefully examined the congressional materials set forth in Part I, *supra*.

3. The Absence Of Proposed Boundaries.

If Petitioner's position is correct with respect to the analogy

19. Petitioner has stated, *supra*, that as of this date, it has not conclusively established the *effect* of each and every agreement ratified by the Act of March 3, 1891, 26 Stat. 1016 (1891). In this respect, and for purposes of *this* paragraph, it is relying on the statement of the Amicus in the court below. Brief for the Association on American Indian Affairs, Inc., and the Sisseton-Wahpeton Sioux Tribe as Amicus Curiae, *United States ex rel. Feather v. Erickson*, 489 F 2d 99 (C.A.8 1973).

of the partial Crow opening set forth in Part I, *supra* at 52-74, the Lake Traverse Reservation would have been effectively disestablished by the passage of the Act of March 3, 1891, opening the reservation to settlement – irrespective of the fact that the Sisseton-Wahpeton agreement had been tailored to the Dawes Act. After the opening the allotments therein would be situated on the public domain in the same manner as the Crow situation.

Similarly, just as there were no remaining boundaries encompassing the ceded or disestablished area in the Crow situation, there would be no remaining boundaries encompassing the ceded or disestablished area of the Lake Traverse Reservation. In the Crow situation this very fact *necessitated* a new or proposed boundary separating the ceded area from the newly diminished reservation. In the Lake Traverse situation the same fact would *necessitate* that there be no new or proposed boundaries to even discuss for there would be no diminished reservation that would remain.[20]

Even the opinion of the court below substantiates this conclusion and hence the position of Petitioner:

> Nothing that can be gleaned from the legislative history or subsequent legislative enactments can be fairly said to shed any further light upon the intent of the Congress regarding the *reservation boundaries*. The Committee reports on the 1891 Act[6] and reports on similar bills that were not enacted[7] *do not discuss the proposed boundaries*. . .
>
> We must view as significant the fact that our search of the legislative documents subsequent to the 1891 Act

20. But for the large number of allotments in the Lake Traverse Reservation, a description of each would probably have been noted when the boundaries were disestablished.

> unearths no teltale language as to the law maker's will concerning the *boundaries* of the Lake Traverse reservation. The significance lies, of course, in the test to be applied. That is, congressional expression or clear implication diminishing the reservation boundaries. Pet. App. A 7a, 8a (emphasis added).

In its proper historical perspective (i.e., in light of the congressional intent clearly evidenced inthe Crow situation and others passed the same day) this fact alone should have led the court below to an opposite conclusion. Instead, the court completely misconstrued its significance and stressed in the opinion below that the lack of proposed boundary discussion indicated the continued existence of the Lake Traverse Reservation.

4. Prior Judicial Interpretation.

Those sections of the Act of March 3, 1891, that ratified the Sisseton-Wahpeton agreement have had a long prior history of judicial interpretation, none of which is consistent with the conclusion reached by the court below.

In 1958 the South Dakota Supreme Court, in *Application of DeMarrias for Writ of Habeas Corpus*, 77 S.D. 294, 91 N. W. 2d 480 (1958), held that, by virtue of the ratification of the 1889 agreement, the Sisseton-Wahpeton Indians ceded the lands to the United States, and that the lands were thereby restored to the public domain.

Although the court found the Lake Traverse Reservation, as such, to be effectively disestablished, it specifically noted that it found nothing contained in the 1889 agreement indicating an intention to dissolve the tribal government.[21] The court stated:

21. Discussed *infra*, at 101-102.

> In fact, the tribal organization is still existing. Their Tribal Constitution was approved by the Commissioner of Indian Affairs on October 16, 1946. Article I recognizes the limited extent of their jurisdiction in the following language: "The jurisdiction of the Sisseton-Wahpeton Sioux Tribe shall extend to *all Indian-owned lands* lying in the territory within the *original* confines of the Sisseton-Wahpeton Lake Traverse Sioux Reservation." *Application of De Marrias for Writ of Habeas Corpus*, 77 S. D. 301, 91 N.W. 2d 484 (1958) (emphasis added).

If the Lake Traverse Reservation had never been disestablished the emphasized terminology as set forth above would have been superfluous in light of the then existing state and federal case law rejecting "checkerboard jurisdiction" *within* the boundaries of reservations. *See*, 93-100, *infra*.

In *State v. DeMarrias*, 79 S.D. 1, 107 N.W.2d 255 (1961), *cert. den.* 368 U.S. 844 (1961), theSouth Dakota Supreme Court reaffirmed its earlier decision in another case involving the same defendant and the same reservation wherein a similar issue was raised.

Habeas corpus proceedings were then commenced in the United States District Court for the District of South Dakota, Northern Division, but the Court denied the writ. *DeMarrias v. State of South Dakota*, 206 F. Supp. 549 (D.S.D. 1962). Significantly, the opinion cited and distinguished the then recent decision of this Court, *Seymour v. Superintendent* ,368 U.S. 351 (1962), and appeal was taken.

The Eighth Circuit Court of Appeals affirmed upon the basis of the trial court's "well reasoned" and "carefully considered opinion." *DeMarrias v. State of South Dakota*, 319 F.2d 845, at 847,846 (C.A. 8 1963). Significantly, the opinion noted that the trial court had more than adequately distinguished *Seymour, supra*.

Each of the foregoing opinions was soundly based upon a careful reading of the Act of March 3, 1891. In addition, the Federal District Court engaged in an in depth analysis of the special state and federal statutes that were in force concerning the South Dakota reservations after the turn of the century. *De Marrias v. State of South Dakota*, 206 F. Supp. 549, at 550, 551 (D.S.D. 1962). Yet the court below, for reasons that were to become evident in the course of its opinion, overruled the *De Marrias* decisions. Admittedly, none of the *De Marrias* decisions analyzed the legislative history as this Court did in *Mattz v. Arnett*, 412 U.S. 481 (1973), but neither did the court below.

In addition to the above cases, the only other major decision involving the original Lake Traverse Reservation was *United States v. Rickert*, 188 U.S. 432 (1903), which was not cited in any of the opinions, but nevertheless must be mentioned. In *Rickert* this Court held that the county of Roberts, South Dakota, could not collect taxes on certain improvements on, and personal property used in the cultivation of, land in that county occupied by members of the Sisseton band of Sioux Indians. The crux of the decision centered around the fact that the occupants were still wards of the United States. In this respect the decision probably cannot be said to shed any signifcant light on the issue presented herein.

However, Petitioner would submit that a close reading of the opinion reveals that in 1903 the land so allotted was not then considered to be within the boundaries of any reservation. Time and time again the land so situated was referred to as simply "county of Roberts, South Dakota." *United States v. Rickert*, 188 U.S. 432 (1903). In fact the only specific reference in the *present* tense in the opinion to the reservation was:

> . . .that the said Indians are holding, and for several years last past have held, allotted lands inthat county, and within the *former* Sisseton Indian Reservation. . . *United States v. Rickert, supra* (1903) (emphasis added).

Although the "former" reference, by itself, is of negligible probative value, when read in context with the tenor of the remainder of the opinion it nevertheless reflects the status of the Lake Traverse Reservation in this Court's mind in 1903.

5. Additional Materials.

If the opinion of the court below does not accurately reflect the intent of Congress in 1891, Petitioner is, to a large extent, responsible. The judicial system is founded upon and functions best as an adversary proceeding, and Petitioner simply has not recently lived up to its responsibility in this respect. Domestic difficulties within the State of South Dakota over the past two years have resulted in a burden on the staff and resources of Petitioner, the result of which was simply that Petitioner had not been able to adequately present the position of the State in the recent cases, and our brief below was, unfortunately, no exception.

In the court below Respondent submitted a cogent argument asking the court to depart from its 1963 position in light of certain recent decisions. Petitioner relied exclusively on the 1963 position of the court presented in a similarly cogent three page argument. When the Association on American Indian Affairs, Inc., as *amicus curiae*, submitted it's excellent 50 page brief with over 140 citations to legislative history, Land Decisions and Archives materials, Petitioner simply did not respond for the reasons set forth above.

This is the reason for the statement in the Petition for Writ

of Certiorari that since the decision below, the State has devoted considerably more time and effort to research that had not been presented to the court below. Petitioner has not, as Respondent has alleged, asked anyone to "buy a pig in a poke." Respondent's Brief in Opposition to Writ of Certiorari, at 5, *United States ex rel. Feather v. Erickson*, (1973).

Similarly, with respect to Respondent's position that this "new material cannot properly be presented before this Court," Petitioner would only state that it is somewhat disturbed to think that anyone would want this Court to resolve an issue of congressional intent with any limitations imposed other than what this Court would impose upon itself.

The concurrence of Petitioner that certiorari be granted in Memorandum for Respondent's Concurrence that Certiorari Be Granted, No. 73-1148 at 8, *DeCoteau v. District County Court*, was founded upon the belief that this Court should authoritatively resolve the issue presented. If Petitioner can render any assistance that the Court might deem helpful in this respect, it would be more than willing to assume that responsibility. Consistent with this position, a stipulation has been filed in the Office of the Clerk to the effect that Petitioner will not resist any responsible party who might request this Court's permission to enter an appearance as *amicus curiae*.

B. THE RATIONALE OF *SEYMOUR* AND *MATTZ* DOES NOT REFLECT THE STATUS OF THE SISSETON-WAHPETON "CEDE, SELL, RELINQUISH" ACT OF MARCH 3, 1891.

Part I of this brief was devoted to an examination of the legislative history of pure cession agreements and the one in the instant case tailored to the Dawes Act of 1887. Petitioner has taken theposition that the effect upon a reservation or a portion

thereof with respect to the issue presented herein was one and the same; in both instances the reservation or a portion thereof was effectively disestablished and restored to the public domain.

Although the Sisseton-Wahpeton agreement was tailored to the Dawes Act of 1887, it was still of the sum certain variety, a cession to the United States with only the *proceeds* of the sale deposited "in trust" to the credit of the members of the Sisseton-Wahpeton Tribe. In this respect the operative language and arrangement in the Sisseton-Wahpeton agreement and the 1891 Act are technically a world apart from the operative language and peculiar "trust" arrangement of the 1906 Colville Act construed in *Seymour v. Superintendent*, 368 U.S. 351 (1962).

The exact and precise precusor of the 1906 Colville Act actually emanated from the congressional mind between 1901 and 1903. The Act of April 23, 1904, opening a portion of the Rosebud Reservation in South Dakota, was the first concrete manifestation of this type of complete "trust" arrangement. Act of April 23, 1904, 33 Stat. 254 (1904). Significantly, an examination of the legislative history of this and two later Rosebud acts indicates that a strong argument could be made that Congress did not intend to change the necessary effect of the earlier pure cessionpolicy, even up to and through 1910.

Thus, one would have a continuity in policy from the time of the pure cession agreements through the modified Sisseton-Wahpeton agreements up and to the trust statutes of the early 1900's. In the absence of some specific congressional intent to the contrary, this continuity of policy would unfold as a series of reservations disestablished or at least diminished by special acts of Congress " opening them to settlement." To the

extent this Court might deem the rationale of either *Seymour* or *Mattz* controlling inthe instant case, Petitioner will therefore proceed in the alternative: 1. The rationale of *Seymour* and *Mattz* does not square with the explicit congressional intent evidenced by more than 25 years of legislative history and related documents of the Office of Indian Affairs and should therefore be departed from. 2. Or in the alternative, that this Court in both *Seymour* and *Mattz* was involved in the construction of acts sufficiently distinguishable from the Sisseton-Wahpeton type of arrangement to limit the holdings to the facts presented therein.

At first glance such an alternative agrument might seem unwarranted in light of the position that each case must be determined upon its own facts and legislative history, especially in view of the understandable and meritorious position that this Court would be reluctant to decide issues of a generalized nature. However, as evidenced by some of the general pronouncements in *Mattz* as to the effect of all 1887 Dawes surplus land statutes "opening" reservations to settlement, for all intents and purposes, the instant case could effectively resolve, because of or incombination with *Seymour* and *Mattz*, the status of each and every "opening" subsequent to 1887. Petitioner would submit that for this Court to rely solely on the rationale of *Seymour* and *Mattz* and limit again its perspective to one statute and a particular reservation could result in a holding that would effectively negate the crux of nearly three decades of legislation intended by Congress to restore to the public domain over 50,000,000 acres of land previously held within the boundaries of Indian reservations.

1. Persuasive Evidence of Continuity, If Necessary.

The conflicts and confusions within the Eighth Circuit and between the Eighth Circuit Court of Appeals and the South Dakota Supreme Court resulted in an extensive review of

legislative history by the parties and the court in *Rosebud Sioux Tribe v. Kneip*, No. Civ. 72-4055 (D.S.D. filed Feb. 6, 1974) (mem). In a well written and extensively documented opinion, the Federal District Court of South Dakota, Northern Division, in the face of *Seymour* and *Mattz* and the recent decisions of the Eighth Circuit Court of Appeals, held that the Rosebud Reservation had in fact been diminished by a series of bills enacted over a six year period (1904-1910).

Since the legislative history of the Rosebud Reservation represents the transition period from modified cession agreements similar to the Sisseton-Wahpeton agreement to the exact "trust" replicas of the 1906 Colville Act, it is of a much more explicit and detailed nature than other legislative histories of many of the later acts which were simply introduced, understood and passed. In addition, because the Rosebud Reservation was the target of three separate acts, the partial opening effect similar to that described at 9-12, *supra*, is very pronounced, and enables one to view the effect of the acts both prospectively and retrospectively.

Therefore Petitioner will rely upon the above attributes of the Rosebud material to place this Court in a more advantageous position from which to view the whole process than was possible from an examination of the legislative history in *Seymour*. From this position Petitioner will urge the Court to depart from the rationale of *Seymour*, if such an argument need be maintained.

It will not be necessary to set forth in the text of this brief any of the Rosebud material. The issue was extensively briefed by both parties prior to the 53 page memorandum decision of the Federal District Court. Both the briefs and the opinion are set forth in Appendix II. On appeal to the Eighth Circuit Court

of Appeals the briefs of both parties were revised and updated and are set forth at Appendix III. Petitioner will rely on the arguments and legislative history presented therein.

Similarly, the Sisseton-Wahpeton materials and related documents discussed in Part I of this brief can be utilized in a like manner with respect to the rationale of *Mattz*.

In this respect, it is interesting to note that even after the decision of this Court in *Seymour*, only seven decisions have applied the rationale therein to similar acts "opening" other reservations. On the other hand, seventeen federal and state Supreme Court decisions have found distinctions upon which to base their reluctance to reestablish reservation boundaries where none existed. *See* discussion, *infra* at 96 98 .

2. In The Alternative, A Distinction.

> The ratification of agreements by the act of March 3, 1891 (26 Stats., 989), restored to the public domain. . . from the Lake Traverse Reservation, South Dakota, about 660,000 acres,. . . Report of the Commissioner of Indian Affairs, 44 (1891).

In 1891 the Commissioner of Indian Affairs aptly and unequivocally described theprecise effect the Act of March 3, 1891, had on the Lake Traverse Reservation. It is the position of Petitioner that this Court should not construe the rationale of either *Seymour* or *Mattz* as controlling in the instant case.

(a) *Seymour v. Superintendent*, 368 U.S. 351 (1962).

The primary and most significant distinction is of course on the face of the acts. The Act of March 3, 1891, was a sum certain cession agreement with the United States government whereby the United States bought and members of the Sisseton-Wahpeton band of Indians agreed to "cede, sell, relinquish, and convey to the United States all their claim, right,

title, and interest in and to" their surplus land. Act of March 3, 1891, 26 Stat. 1036 (1891). This certainly does not describe the "trust" situation in *Seymour v. Superintendent, supra.*

In fact, if any aspect of the *Seymour* opinion is analagous to the legislative history of the Sisseton-Wahpeton agreement it would be the 1892 Colville Act which did extinguish, subject to individual allotments, the north half of the Colville reservation. After all, 1891 Act in the instant case is chronologically much closer to the 1892 Colville Act than to the 1906 Colville Act, to say the least. One could rationally assume that it should be more in tune with the prevalent attitude of Congress at the time, especially in light of the Crow and Fort Berthold agreements discussed *supra*, that were procedurally on "all fours" with the 1892 Colville situation.

In addition, in *Seymour*, Justice Black deemed the public domain language of the 1892 Act significant. In this respect Petitioner would call this Court's attention to the Annual Report of the Commissioner of Indian Affairs and statements of Senator Dawes and other congressmen attributing the same precise effect to the Sisseton-Wahpeton Act. In both situations the allotments were to be situated on the public domain. Furthermore, immediately after the openings, both the 1892 Colville Reservation and the Lake Traverse Reservation were similarly removed from the Office of Indian Affairs Maps and Schedules recording the then existing Indian reservations in the United States. But for the fact that the 1892 Act affected only a portion of the Colville Reservation and the 1891 Act affected all of the Lake Traverse Reservation, the effect of both acts would have been the same.

Even Petitioner in *Seymour* recognized the importance of the similarities between the 1891 Sisseton-Wahpeton Act and

the 1892 Colville Act when it cited *Application of DeMarrias*, 77 S.D. 294, 91 N.W. 2d 480 (1958), and concluded that the acts had the same effect:

> *Application of Demarias*[sic], 77 S.D. 294, 91 N.W. 2d 400 (Resp. Br. 21), involved a burglary by an Indian on non-Indian land within the original boundaries of the Sisseton-Wahpeton Lake Traverse Indian Reservation in South Dakota. The land upon which the crime was committed, together with all other unallotted lands of the reservation, had been ceded to theUnited States in return for payment of a stipulated sum to the Indians. The cession was ratified by the Act of March 3, 1891, 26 Stat. 989, 1035-39, §§26-27, which provided *inter alia*, that lands ceded should be subject to the laws of the state. *Any similarity in the statutes relating to the Lake Traverse and Colville Reservations applies only to the north half of the Colville Reservation (ceded by the Act of 1892) and not to the diminished ("south half") reservation dealt with in the Act of 1906.* Reply Brief for Petitioner at 10, Seymour v. Superintendent, 368 U.S. 351 (1962) (emphasis added).

Secondly, Justice Black found that the 1906 Act repeatedly referred to the Colville Reservation in a manner that made it clear that the intent of Congress was that the reservation should continue to exist as such. Nothing in the Sisseton-Wahpeton Act can be fairly said to support a similar statement.

(b) *Mattz v. Arnett*, 412 U.S. 481 (1973).

As was the case with *Seymour*, the most significant distinction between the Klamath River and Sisseton-Wahpeton Acts appears on the face of the acts. In the 1892 Klamath River Act theUnited States did not conclude an agreement with the residents of the Klamath River Reservation wherby they agreed to ". . .cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to. . ." their surplus land for a sum certain as it did in the Sisseton-Wahpeton situation.

Nor was the United States government free to do anything it wanted with the proceeds from the sale of the lands to the settlers in the 1892 Klamath River Act as it was in the Sisseton-Wahpeton situation. Again, as was the case with *Seymour*,the 1891 Sisseton-Wahpeton Act more closely parallels the 1892 Colville Act in both respects.

Similarly, as was the case in *Seymour*, Petitioner in *Mattz* recognized and primarily relied on this cession distinction specifically when he stated in the text of the reply brief on the merits that:

> *Ellis v. Page, supra*, for example, involved an agreement between the Government and the Indians which provided that the tribes occupying the reservation would
>
> "cede, convey, transfer, relinguish [sic], and surrender, forever and absolutely, without any reservation whatsoever, express or implied, all their claim, title, and interest, of every kind and character, in and to the lands embraced [within the reservation.]"
>
> The court described those words as 'unequivocal' (351 F.2d 250 at 252) and said
>
> "In treaty parlance they are as appropriate to disestablish the reservations as the Congressional words 'vacate and restore' employ in the 1892 Act to disestablish a part of the Colville Reservation."
>
> In other words, the Tenth Circuit based its decision on what it considered language showing a clear intent to terminate.[3]
>
> *Tooisgah, supra*, and *DeMarrias, supra*, were based on agreements that are indistinguishable from the one considered in *Ellis*.
>
> The approach adopted by the *Ellis* court is exactly what Petitioner believes is required here. To terminate a reservation a statute must use a phrase such as. . . .Reply Brief for Petitioner at 7-8, *Mattz v. Arnett*, 412 U.S. 481 (1973).

Significantly, this language does restore surplus lands to the public domain.

Secondly, considerable importance was attached in the *Mattz* opinion to the fact that prior efforts to restore the surplus lands to the public domain in the Klamath River legislative history had failed. *Mattz v. Arnett, supra,* at . While only certain quarters of the House favored such action in the Klamath River situation, this was definitely not the case with the Sisseton-Wahpeton agreement. The language of the annual report of the Commissioner of Indian Affairs, Senator Dawes and the other members of Congress who addressed themselves to the issue, all attributed the "public domain" effect to the Act of March 3, 1891. In this act Congress did "terminate the reservation and open it for white settlement" *Mattz v. Arnett, supra,* at .

The remaining and perhaps most important single statement of the *Mattz* opinion, as it relates to the instant case, is the standard of termination or disestablishment set forth therein: "...A congressional determination to terminate must be expressed onthe face of the Act or be clear from the surrounding circumstances and legislative history...." *Mattz v. Arnett, supra,* at . In this respect Petitioner would submit that the Sisseton-Wahpeton material set forth in Part I, *supra*, surpasses that which is required–both on the face of the act and *especially* in light of the surrounding circumstances and legislative history.

III.

A CONSIDERATION OF THE STATUTORY DEFINITION OF INDIAN COUNTRY IS NOT RELEVANT UNTIL AFTER THE STATUS OF THE LAKE TRAVERSE RESERVATION HAS BEEN RESOLVED.

Petitioner has waited until this point to discuss the jurisdictional implications of the material herein for the simple reason that it is not until after this Court has examined such material that a consideration of 18 U.S.C. §1151 becomes relevant. The attempt on the part of the United States to insert its 1948 "crazy-quilt" argument at the outset of what should have been essentially a discussion of congresssional intent at the turn of the century, is wholly misplaced, literally and figuratively. By following this argument to its logical conclusion, one would end up with approximately one-fifth of the entire western half of the United States "within" the boundaries of reservations that have heretofore been disestablished and restored to the public domain.

The definition of Indian Country is set forth at 18 U.S.C.§1151.

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b)all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running

through the same. June 25, 1948, c. 645, 62 Stat. 757; May 24, 1949, c. 139 §25, 63Stat. 94.

Only subsections (a) and (c) are relevant to the issue presented herein.

A. 18 U.S.C. §1151(a): WITHIN THE LIMITS OF ANY INDIAN RESERVATION.

In 1948 when the definition of Indian Country was revised to its present form, it was the almost unanimous conclusion of the state and federal courts that "opened reservations" were not reservations at all. Rather, this terminology denoted areas which were once reservations but had been disestablished by special acts of Congress.

For example, in the Crow situation described, *supra*, after the opening the boundaries were receded to encompass the area remaning or the diminished reservation, the opened reservation was no longer within the boundaries of the Crow Reservation, although it continued to be improperly referred to as the "opeened reservation." The trust allotments situated on the "opened" portions were interspersed among the fee land of the settlers after the opening–outside the boundaries of the reservation.

The trust allotments within the boundaries of the reservation were interspersed among the rest of the undivided tracts of trust land. After a period of time, the United States no longer held the title to all the area within the boundaries of the reservation in "trust." Primarily this situationwas the result of the issuance of patents in fee to individual members of the tribe for one reason or another. In some instances the title to the land was further removed from the United States by the transfer thereof to another person –sometimes a member of the

tribe and sometimes not.

This whole process soon resulted in the "checkerboarding" of fee and trust land *within* the diminished reservation. The jurisdictional ramifications soon resulted in a hotly contested issue in many of the state and federal courts. In 1948 Congress resolved the issue by defining Indian Country, in part, as

> (a) [A]ll land within the limits of any Indian reservation under the jurisdiction of the United States government, not withstanding the issuance of any patent, and, including rights-of-way running through the reservation . . . 18 U.S.C. §1151

In effect, Congress had codified the decisions of those courts which had previously resolved the issue consonant with the definition. One such decision upon which the Reviser relied was the 1943 decision of *Kills Plenty v. United States*, 133 F. 2d 292 (C.A.8 1943), *cert. den.* 319 U.S. 759 (1943). *See* Reviser's Note, 18 U.S.C. §1153.

In *Kills Plenty* the Eighth Circuit Court of Appeals held that all of the land within Todd County was "Indian country" irrespective of the issuance of patents in fee. Todd County was the only county of the original Rosebud Reservation that had *never* been "opened" to settlement. Todd County was, for all purposes, the Rosebud Reservation, sometimes referred to as the diminished Rosebud Reservation in acts of Congress, opinions of state and federal courts, the Office and Bureau of Indian Affairs, maps, and every other source one can imagine from 1910 until 1972. *See* Appendix II, Appendix III. In 1943 areas that were once reservations but were subsequently opened by special acts of Congress were *not* within the boundaries of reservations any more than the opened portion of theCrow Reservation was within the new boundaries of the

diminished Crow Reservation.

Indeed, no one can read the *Kills Plenty* decision and the cases cited therein and support a contrary conclusion. This was the decided, almost unanimous, view in 1943 in all of the decisions of the state and federal courts. One can only imagine how the Reviser of 18 U.S.C.§1151 would have reacted had the Eighth Circuit Court of Appeals in 1950 reversed *Kills Plenty* and held that the boundaries of the Rosebud Reservation did not really encompass the diminished Rosebud Reservation, but actually remained as originally established in 1889, encompassing areas which werenot within the boundaries of *the* reservation for over 40 years.

It is interesting to note that the 1922 decision of *United States v. Frank Black Spotted Horse*, 282 F.349 (D.S.D. 1922), cited by Justice Black with approval in *Seymour* dealt with the same checkerboard situation resolved by the court in *Kills Plenty*: Todd County, the diminished Rosebud Reservation. The court in *Frank Black Spotted Horse* resolved the issue in the same manner that was later followed in *Kills Plenty*. When the Reviser cited Kills Plenty with approval he was in effect eliminating the impractical pattern of checkerboard jurisdiction. But this was "within" a diminished reservation that had never been "opened." Petitioner has not been able to ascertain from a reading of Seymour why Justice Black thought that such a situation within a portion of a reservation that had never been opened was persuasive in eliminating the impractical pattern of checkerboard jurisdiction in a reservation that had been "opened."

In one respect, this absence of any citations in the*Seymour* opinion to precedence on "all fours" with the Colville "open" reservation situation is understandable. *See* discussion at

§4-§§, supra. Prior to the decision, the *decided weight* of authority had for fifty years reached a contrary conclusion. Even more interesting, however, is the fact that even *after* the *Seymour* decision, in seventeen separate instances, state and federal courts still refused to apply the rationale therein to other reservations which had been "opened." *DeMarrias v. State of South Dakota*, 319 F.2d 845 (C.A. 8 1963), *aff'g* 206 F. Supp. 549 (D.S.D. 1962); *Ellis v. Page*, 351 F.2d 250 (C.A. 10 1965), *aff'g Ellis v. State*, 386 P.2d 326 (Okl. Cr. 1963); *Lafferty v. State ex rel. Jameson*, 80 S.D. 411, 125 N.W. 2d 171 (1963); *Wood v. Jameson* 81 S.D. 12, 130 N.W. 2d 95 (1964); *Bird in the Ground v. District Court, 239 F. Supp. 981 (D.Mont. 1965); State v. Barnes*, 81 S.D. 511, 137 N.W. 2d 683(1965); *State ex rel. Swift v. Erickson*, 82 S.D. 60, 141 N.W. 2d 1 (1966); *Bear [illegible]e v. United States*, 387 F.2d 280 (C.A. 8 1967) (dictum); *State v. Moss*, 471 P.2d 333 (Wyo. 1970); *State v. Satiacum*, 80 Wash. 2d 492, 495, P.2d 1035 (1972); *State v. Williamson, 211 N.W.2d 182 (S.D. 1973); DeCoteau v. District Court*, 211 N.W.2d 843 (S.D. 1973); *Rosebud Sioux Tribe v. Kneip*, No. Civ 72-4055 (D.S.D, filed Feb. 6, 1974) (mem.); *Cook v. State*, 87 S.D. , 215 N.W. 2d 832 (1974); and *United States ex rel. Feather v. Erickson*, No. (D.S.D. filed May 30, 1973).

Perhaps these refusals to follow *Seymour* were simply a result of a reluctance to recreate reservation boundaries which had for over fifty years been disestablished. Perhaps some of the older decisions remained persuasive even against the glare of the *holding* in *Seymour*.

In any event, in only seven instances since the decision in *Seymour* have courts applied the rationale thereof to "open" reservations and in the majority of these the questions were "close," the materials "inconsistent and confusing" or opinion

founded upon a reluctance of a state court to disagree on a federal question. *United States ex rel. Condon v. Erickson*, 344 F. Supp. 777 (D.S.D. 1972); *United States ex rel. Condon v. Erickson*, 478 F.2d 684 (C.A. 8 1973); *Leech Lake Band of Chippewa Indians v. Herbst*, 344 F. Supp. 1001 (D. Minn. 1971); *City of New Town v. United States*, 454 F.2d 121 (C.A. 8 1972); *State v. Molash*, 199 N. W. 2d 591 (S.D. 1972); *Mattz v. Arnett*, 412 U.S. 481 (1973); and *United States ex rel. Feather v. Erickson*, 489 F2d 99 (C.A. 8 1973).

B. 18 U.S.C. §1151(c): ALLOTMENTS ON THE PUBLIC DOMAIN.

In 1948 even Congress realized that the definition of Indian Country set forth in 18 U.S.C.§1151(a) would not encompass those trust allotments on the public domain in the opened areas of what had thertofore been reservations.

As a result, 18 U.S.C.§1151(c) was set forth as an addition to the definition of Indian Country.

> (c) [A]ll Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Logically enough, to support the continuation of these allotments as Indian Country, the Reviser cited *tne decision of this Court which held that allotments on the public domain in the opened areas of what had theretofore been reservations should continue to be subject to federal jurisdiction: United States v. Pelican, 232 U.S. 442 (1913)*

> Indian allotments were included in the definition on authority of the case of U.S. v. Pelican, 1913, 34 S. Ct. 396, 232 U.S. 442, 58 L.Ed. 676. Eighth Congress House Report No. 304. Reviser's Note. 18 U.S.C.

§1151.

In *Pelican* this Court held that federal jurisdiction was not extinguished merely because the trust allotment had been left behind on the public domain when the boundaries of a reservation were receded after the opening of that reservation. Specifically, this Court in *Pelican* was involved with the 1892 opening of the Colville Reservation which disestablished approximately one half of the Colville Reservation in the same manner as the Crow situation discussed, *supra*. To this extent, 18 U.S.C. §1151(c) specifically approved and provided for the impractical pattern of checkerboard jurisdiction. Some provision had to be made for the opening that left behind trust allotments situated on the public domain outside the boundaries of a reservation. Petitioner would submit that this provision, 18 U.S.C. §1151(c) was specifically tailored to fit precisely the situation presented by the Sisseton-Wahpeton opening.

It is interesting to note that as recently as 1967, the Eighth Circuit Court of Appeals, which had for years handed down cogent and authoritative decisions like *Kills Plenty* concurred in this analysis in another cogent and well-written opinion, *Beardslee v. United States, 387 F.2d 280 (C.A. 8, 1967).*

Oddly enough the issue in *Beardslee* was the same issue that had been previously presented in Frank Black Spotted Horse and *Kills Plenty*: checkerboard jurisdiction in the diminished Rosebud Reservation, Todd County. The court in *Beardslee* reaffirmed both of the previous decisions on point. Disestablishment could not be affected merely by the issuance of fee patents to an Indian or the conveyance thereof to another person. In 1948 Congress had eliminated the impractical pattern of checkerboard jurisdiction within

reservations that had never been opened.

But this had nothing to do with the "opened" areas of what had theretofore been reservations and the court in *Beardslee* recognized the distinction.

> . . .Clause (c) came into the statute as the result of the holding in *United States v. Pelican*, 232 U.S. 442, 34 S.Ct. 396, 58 L.Ed. 676 (1942), namely, that lands allotted to Indians remained within the definition of Indian country even though the rest of the reservation was opened to settlement. See Reviser's Note following 18 U.S.C.A. § 1151 (1966), and 80th Congress House Report No. 304. Clause (c) is an addition to and not a limitation upon the definition of Indian country embraced in the preceding portions of §1151. We regard (c) as applying to allotted Indian lands in territory now open and not as something which restricts the plain meaning of clause (a)'s phrase "notwithstanding the issuance of any patent". Although this result tends to produce some checkerboarding in non-reservation land, it is temporary and lasts only until the Indian title is extinguished. The congressional purpose and intent seem to be clear. *Beardslee, supra* at 287.

The above analysis was soundly founded upon a careful reading of precedence, the Reviser's Notes of 18 U.S.C. §1151 and citations therein, and represents the most thorough treatment of the question to date.

CONCLUSION

Petitioner has never questioned the validity or the necessity for the absence of checkerboard jurisdiction within the boundaries of reservations. But this whole process of commencing the consideration of issues similar to the nature of the one presented herein with the 1948 statutory definition of Indian Country could eventually lead to the resurrection of boundaries of reservations encompassing each and every

allotment in the United States–boundaries which have been disestablished for over 80 years.

If one were simply concerned with the loss of state jurisdiction over members of the various tribes residing in areas predominantly populated by the same, a recreation of the situation as its existed on the maps of Indian reservations in 1870 or 1880 would not be a monumental catastrophe.

Unfortunately, this is not the case. Thousands of other citizens now reside on farms and ranches and in cities and towns in the areas that would be engulfed by such a process. These individuals settled on the public domain and were never required or asked to abide by any of the special federal statutes concerned with various aspects of life within the boundaries of a reservation. Nor have they been subject to whatever "sovereign power" any tribe might, today or 50 years from today, exercise over non-members residing within the boundaries of a reservation.

Many of the citizens of the United States have *elected* to live within the boundaries of a reservation. They have knowingly decided to subject their lives and property to the many special federal and tribal laws therein. This was a choice presumably made with the realization of the consequences thereof. Such is not the case in the situation presented herein.

The members of the Sisseton–Wahpeton Tribe elected to cede their reservation in 1889. Congress ratified the cession in the Act of May 3, 1891. Since that time, the tribe has prospered. The tribal organization and the Bureau of Indian Affairs have worked hand in hand in many instances with the State, to achieve this result. A portion of the land has always been held in "trust" and as such remains Indian Country today, but it has never been within the boundaries of the Lake

Traverse Reservation since that reservation was disestablished by the Act of March 3, 1891. Petitioner would submit that no sovereign necessity exists today to disregard the import of theprobative evidence of that disestablishment presented herein.

It is respectfully submitted that the ruling of the Eighth Circuit Court of Appeals is erroneous. It should be reversed and that court instructed to deny Respondents' applications for writs of habeas corpus.

Respectfully submitted,

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